

8/1/90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOVIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE ELISIAK; JEANETTE ELISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAN-
CON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

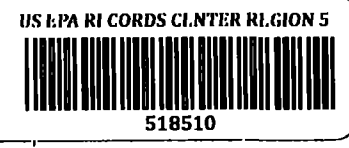
Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,



Civil
No. 7-
Third-
Party

90-7-1-

1 AMERICAN PRINTER & LITHOGRAPHER CO.,)
 AMERICAN RIVET COMPANY, APSCO,)
 2 APPROVED INDUSTRIAL REMOVAL, INC.,)
 ARMOUR PHARMACEUTICAL, ARTISAN HAND)
 3 PRINTS, ASHLAND CHEMICAL CO.,)
 AVENUE TOWING COMPANY, TAPP &)
 4 MILES, INC., BELDEN ELECTRICAL)
 PRODUCTS DIV. OF COOPER INDUSTRIES,)
 5 INC., BRETFORD MANUFACTURING, INC.,)
 BUTLER SPECIALTY COMPANY, INC.,)
 6 BY PRODUCTS MANAGEMENT, CALUMET)
 CONTAINER, CARGILL, INC.,)
 7 CHEM-ALLOY DIVISION OF FISHER- CALO)
 CHEMICAL CO., CHICAGO ETCHING CORP.,)
 8 CHICAGO NAMEPLATE COMPANY,)
 CHICAGO ROTOPRINT CO.,)
 9 C & C INDUSTRIAL MAINTENANCE CORP.,)
 CITY OF GARY, INDIANA, C.P. CLARE)
 10 DIVISION OF GENERAL INSTRUMENTS)
 CORP., C.P. HALL CO.,)
 11 C.P. INORGANICS, COMMANDER PACKAGING,)
 CONNOR FOREST INDUSTRIES, CONSERVA-)
 12 TION CHEMICAL, CONSUMERS PAINT)
 FACTORY, INC., CONTINENTAL)
 13 WHITE CAP DIVISION OF CONTINENTAL)
 CAN COMPANY, CONVERSIONS BY GERRING,)
 14 COUNTY OF DU PAGE, ILLINOIS,)
 CRONAME, INC., CROWN CORK & SEAL)
 15 CO., INC., CULLIGAN INTERNATIONAL)
 COMPANY, CULLIGAN WATER CON-)
 16 DITIONING, INC., FRANK J. CURRAN,)
 CUSTOM METALS PROCESSING,)
 17 DAP, INC. OF BEECHAM COSMETICS,)
 DAUBERT CHEMICAL COMPANY,)
 18 DEUBLIN COMPANY, DOBSON CONSTRUCTION)
 INC., DUO FAST CORPORATION, DU-TONE)
 19 CORP., HAROLD EGAN, ERCO HOUSEWARE)
 CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
 20 PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
 ETHICON, INC., FELT PRODUCTS MFG. CO.,)
 21 FLINT INK CORP., FURNAS ELECTRIC)
 CO., GEARMASTER DIVISION, EMERSON)
 22 ELECTRIC, THE GILBERT & BENNETT)
 MFG. CO., GLD LIQUID DISPOSAL,)
 23 HENRY PRATT COMPANY, J.M. HUBER)
 CORPORATION, HYDRITE CHEMICAL CO.,)
 24 ENTAGLIO CYLINDER SERVICE, INC.,)

1	JOHNSON & JOHNSON, J & S TIN MILL)
	PRODUCTS, FMAACH MFG. CO., LANSING)
2	SERVICE CORPORATION, LAUTTER)
	CHEMICAL, LIQUID DYNAMICS,)
3	LIQUID WASTE, INCORPORATED,)
	STEVE MARTEL, MASONITE CORPO-)
4	RATION, MCWHARTER CHEMICAL CO.,)
	METAL RECLAIMING CORPORATION,)
5	METROPOLITAN CIRCUITS,)
	MIDWEST RECYCLING COMPANY, MONTGOMERY)
6	TANK LINES, MORTON THIOCOL INC.,)
	MR. FRANK, INC., NANSO, INC.,)
7	NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
	NUCLEAR DATA, INC., PPG INDUSTRIES,)
8	INC., PASLODE COMPANY, PIERCE & STEVENS))
	CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
9	PREMIER PAINT CO., PYLE-NATIONAL CO.,)
	R-LITE, REFLECTOR HARDWARE CORP.,)
10	REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
	RICHARDSON GRAPHICS, JOHN ROSCO,)
11	ROSEMA INDUSTRIAL WASTE, ST. CHARLES)
	MANUFACTURING, SCHOLLE CORPORATION,)
12	SCRAP HAULERS, SHERWIN WILLIAMS)
	COMPANY, SHIELD COATINGS, INC.,)
13	SITE CONTROL COMPANY, SKIL CORPORA-)
	TION, SPECIAL COATINGS CO.,)
14	SOUTHERN CALIFORNIA CHEMICAL,)
	SPECIALTY COATINGS, INC.,)
15	SPOTNAILS, INC., STAR TRUCKING, STERN)
	ELECTRONICS, INC., JOE STRAUSNICK,)
16	STUART CHEMICAL & PLANT, INC.,)
	SUMMER & MACE, SUN CHEMICAL,)
17	SYNTECH WASTE TREATMENT CENTER,)
	T.R.C., TEEPACK, INC., ALFRED TENNY,)
18	THIELE-ENGDAHL, INC., THOMPSON)
	CHEMICALS, TIFFT CHEMICALS,)
19	TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
	UNIROYAL, INC., UNITED RESIN AD-)
20	HESIVES, INC., U.S. ENVELOPE, U.S.)
	SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
21	VERSAL RESEARCH LABORATORIES, INC.,)
	UNIVERSAL TOOL & STAMPING COMPANY,)
22	VANDER MOULEN DISPOSAL, VELSICOL)
	CHEMICAL CORP., VICTOR GASKET)
23	DIVISION OF DANA CORPORATION,)
	WARNER ELECTRIC BRAKE & CLUCH CO.,)
24	WARWICK CHEMICAL, WASTE RESEARCH &)

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RECYCLING, XEROX CORPORATION, and)
other unidentified persons.)
Third-Party Defendants.)

DEPOSITION OF RICHARD E. BOICE

August 1, 1990

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The continued deposition of RICHARD
EDWIN POICE, called for examination by the
Defendants, pursuant to notice and pursuant
to the provisions of the Federal Rules of
Civil Procedure of the United States
District Courts, pertaining to the taking
of depositions for the purpose of
discovery, taken before Arnold W.
Goldstine, a Notary Public and Certified
Shorthand Reporter within and for the
County of Cook and State of Illinois, at
227 West Monroe Street, on August 1, 1990,
commencing at the hour of 9:00 o'clock p.m.

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APPEARANCES:

Mr. Alan C. Tenenbaum and
Mr. Leonard M. Gelman
Trial Attorney
Environmental Enforcement Section
Land & Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D. C. 20044

-and-

Mr. Michael R. Berman
Assistant Regional Counsel
Solid Waste & Emergency Response Branch
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Office of Regional Counsel
230 South Dearborn Street
Chicago, Illinois 60604

appeared on behalf of Plaintiff,
United States of America;

1 **APPEARANCES (CONTINUED):**

2
3 **Mr. Michael R. Blankensia**
4 **Wildman, Harrold, Allen & Dixon**
5 **225 West Wacker Drive**
6 **Chicago, Illinois 60606-1229**

7 **appeared on behalf of**
8 **Penn Central Corporation;**

9 **Mr. William G. Dickett**
10 **Sidley & Austin**
11 **One First National Plaza**
12 **Chicago, Illinois 60603**

13 **appeared on behalf of**
14 **Pre Finish Metals, Inc.;**

15 **Mr. Carl B. Willemann**
16 **Sonnenschein Math & Rosenthal**
17 **One Mercantile Center**
18 **Suite 2600**
19 **St. Louis, Missouri 63101**

20 **appeared on behalf of**
21 **Desoto, Inc.;**

22 **Mr. Joseph V. Karaganis**
23 **Karaganis & White, Ltd.**
24 **414 North Orleans Street**
 Chicago, Illinois 60610

appeared on behalf of
 American Can Company, Inc.;

1 APPEARANCES (CONTINUED):

2
3 Mr. James T. J. Hearing
4 Law Offices of James T. J. Hearing, P.C.
5 Printers Row
6 542 South Dearborn Street
7 Chicago, Illinois 60605

8
9 appeared on behalf of
10 Premier Coatings, Inc.;

11
12 Mr. Edward J. Leahy
13 Leahy, Eisenberg & Fraenkel, Ltd.
14 309 West Washington Street
15 Chicago, Illinois 60606

16
17 appeared on behalf of
18 Scholle Corp.;

19
20 Mr. David S. Finch
21 McDermott, Will & Emery
22 227 West Monroe Street
23 Chicago, Illinois 60606-5096

24
25 Mr. Richard S. VanRheenen
26 Cromer, Eaglesfield & Maher, P.A.
27 Station Place
28 200 South Meridian Street
29 Indianapolis, Indiana 46225

30
31 appeared on behalf of
32 J & S Tin Mill Products Company,
33 Inc., et al.;

1 APPEARANCES (CONTINUED):

2
3 Mr. John P. Adams
4 Taylor, Miller, Brown, Hoffmann &
5 Perletti
6 33 North LaSalle Street
7 Chicago, Illinois 60602-2602

8 appeared on behalf of Third-
9 Party Plaintiffs Desoto, et al.;

10 Ms. Carol Dorco
11 Seyfarth, Shaw, Fairweather & Geraldson
12 55 East Monroe Street
13 42nd Floor
14 Chicago, Illinois 60602

15 appeared on behalf of
16 Motorola, Inc.

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E X H I B I T

WITNESS: PAGE:

RICHARD E. VOICE

Direct Examination by:

Mr. Finch 1421

Continued 1557

Mr. Karaganis 1604

E X H I B I T S

Voice Deposition Nos.

52 1603

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RICHARD EDWIN POICE,
having been previously duly sworn,
was examined and testified further as follows:

DIRECT EXAMINATION
(CONTINUED)

BY MR. FINCH:

Q. Back on the record.

This is the continuation of Standard Chemical Company's deposition of Richard E. Poice, pursuant to notice.

Mr. Poice, I would remind you that you are still under oath.

When we were last together, Mr. Poice, you testified in part about statements contained in Part III of responses of the USEPA to comments from respondents on the Midco I and Midco II unilateral administrative orders, a document that is or has been marked as Deposition Exhibit 50 in this deposition.

And as I recall your testimony on Part III of Exhibit 50, it related to an impression of bad faith that you formed about the performance of ERM and the defendants in this lawsuit with respect to preparation of the RIFS.

1 I would call your attention to Exhibit
2 50, if you have a copy of it. If not, I think I
3 can provide you one, and ask you to turn to Part
4 II.

5 Off the record for a moment.

6 MR. TENENBAUM: While we are waiting, can I
7 just reincorporate my objection?

8 (Discussion had off the record.)

9 Back on the record.

10 As we indicated in the previous
11 sessions of this deposition, we object to this
12 line of questioning on EPA's decision-making
13 process and as it relates and go on to
14 record-review issues. And we continue to object
15 to this line of questioning.

16 Subject to this objection, we are
17 allowing the witness to answer questions only
18 when there is a sufficient foundation created
19 relating to this issue of the impression of bad
20 faith.

21 And we assume that when we ask
22 questions at depositions that we notice, that
23 counsel for Standard T will likewise allow us to
24 ask questions on this issue of the impression of

1 bad faith and surrounding circumstances as we
2 are doing.

3 "P. FINCH: To the record is clear, we have
4 every intention of permitting the government to
5 ask appropriate questions relating to the issue
6 of Mr. Boice's impression of bad faith.

7 Inappropriate questions on that
8 subject, however, would include questions that
9 seek information that would invade the
10 attorney-client or work product privileges.

11 Q. Mr. Boice, have you found Part II of
12 Exhibit 50?

13 A. Yes.

14 Q. Now the first sentence of Part II under
15 the subcaption, "General," reads, quote:

16 "A number of the
17 respondents incorporated
18 incorrect or misleading
19 information and assertions
20 in their comments."

21 Do you see sentence?

22 A. Yes.

23 Q. Is it your testimony, Mr. Boice, that
24 none of these incorrect or misleading statements

1 had a role to play in the formation of this
2 impression of bad faith to which you have
3 previously testified?

4 A. I never stated that.

5 Q. Okay.

6 Please look at statement number 1 and
7 response number 1 on the first page of Part II.

8 A. Yes.

9 Q. Do you see that?

10 A. Yes.

11 Q. One moment, please.

12 Is it your impression that the
13 statement set forth in statement number 1 under
14 Part II of Exhibit 50, that is, that the risk
15 evaluation was performed to demonstrate the
16 existence of an imminent and substantial
17 endangerment, was part of this impression of bad
18 faith to which you previously testified?

19 A. Okay.

20 Well, previously all the discussion had
21 been regarding ERM.

22 Q. Right.

23 A. This now is a statement from one of the
24 respondents, not from ERM.

1 Q. I think at one point, and if you wish
2 I could find it in the transcripts --

3 A. I guess it was, I see, it was from the
4 memo from Roy Ball and Elsie Millano.

5 Q. Also so the record is clear, I believe
6 at one point you testified that this impression
7 of bad faith you formed was not directed
8 specifically at ERM but was directed toward the
9 defendant group generally.

10 If you wish I could find the point in
11 the transcript of this deposition where you so
12 testified.

13 A. I think, yes, the performance of ERM
14 well as the performance of the Midco trustees
15 gave me that overall impression.

16 Q. All right.

17 A. I should say the Midco Steering
18 Committee, the Midco representatives.

19 Q. In connection with statement number 1,
20 did you ever advise the Midco trustees or ERM --

21 MR. TENENBAUM: I don't want to interrupt
22 you in the middle, but I am not sure if you have
23 yet established whether the impression of bad
24 faith as is referring to involves this statement

1 or not.

2 MR. FINCH: I thought I had.

3 MR. TENENBAUM: No. He was confused about
4 whether this related to ERM or not and you
5 discussed that.

6 BY MR. FINCH:

7 Q. All right.

8 Was this impression of bad faith to
9 which you have previously testified related in
10 any way to the statement contained in statement
11 number 1 of Part II of Exhibit 50?

12 A. I think that statement would have
13 contributed to my impression.

14 Q. All right.

15 A. Along with all the other things we have
16 already gone over and information in the
17 administrative records regarding their
18 performance.

19 Q. Did you ever advise the Midco trustees
20 or anyone at ERM that the risk evaluation was
21 not performed or was not intended to be
22 performed to demonstrate the existence of an
23 imminent and substantial endangerment?

24 A. Okay.

1 First of all, this statement refers --
2 doesn't refer to the risk assessment conducted
3 in the remedial investigation or feasibility
4 study. It refers to the risk evaluation
5 conducted by PRC, which was incorporated into
6 the unilateral administrative order.

7 And the implication of the statement
8 that this was the whole documentation we have or
9 the whole evaluation we have for the imminent
10 and substantial endangerment.

11 So our response to that is quite
12 appropriate, that, namely:

13 "The risk
14 evaluation referenced is
15 that conducted by PRC
16 Management, Inc. and
17 attached as Appendix III of
18 the Midco I and Midco II
19 UAOs. It was prepared in
20 order to supplement the risk
21 assessment in the RI/FSS by
22 conducting an assessment of
23 the acute risks to the
24 public health due to the

1 sites, and thus to further
2 explore the extent of the
3 actual or threatened
4 imminent and substantial
5 endangerment to human health
6 due to hazardous substances
7 at each site. The RI/FSS
8 themselves provide
9 information that an imminent
10 and substantial endangerment
11 to the public health and the
12 environment may exist due to
13 potential, subchronic and
14 chronic exposures to the
15 hazardous substances from
16 Midco I and Midco II sites."

17 Q. You just read verbatim the bulk of the
18 official response to statement number 1
19 contained in Exhibit 50, correct?

20 A. That's correct. I think it is quite an
21 appropriate response.

22 Q. Okay.

23 Did you draft this official response
24 contained in Exhibit 50?

1 MR. TENENBAUM: Objection, instruct the
2 witness not to answer. To seek discovery or
3 compilation of record decisionsal documents.

4 MR. FINCH: No, it doesn't.

5 MR. TENENBAUM: The Agency deliberative
6 process.

7 MR. FINCH: Agency deliberative process?

8 MR. TENENBAUM: That is who in the Agency
9 wrote the first draft on this. That is what was
10 said.

11 MR. FINCH: I am entitled to know whether
12 this witness' verbatim recitation of this
13 response tracks in equally verbatim form the
14 impression that he personally had of the issues
15 raised by statement number 1.

16 And one way to find that out is to ask
17 him whether the language that he just read
18 verbatim into the record is his own language, or
19 the language of somebody else that he is now
20 adopting.

21 MR. TENENBAUM: I think we have gone askance
22 from the issue of impression of bad faith.

23 I mean, you haven't even focused in
24 on -- the witness has indicated that yes, he

1 thought that part of his impression of bad faith
2 had something to do with this, but you haven't
3 even found out in what way yet. You have gone
4 away from that.

5 MR. FINCH: I have laid a more than adequate
6 foundation for this line of questioning.

7 MR. TENENBAUM: You laid a foundation. Then
8 you started asking questions outside of the
9 foundation.

10 Why don't we get back to the how this
11 relates to the impression of bad faith. Then if
12 there is something he needs to explain about
13 this as to why it contributed to his impression
14 of bad faith, he can do that.

15 MR. FINCH: I think perhaps if you were
16 asking the witness questions, you may want to do
17 it that way, but I choose not to.

18 I also choose not to argue with you,
19 Alan, on the record. In order to expedite this,
20 I will ask my questions and you can just issue
21 your instructions not to answer if you so
22 choose.

23 Q. Did you ever advise, Mr. Boice, any of
24 the "Idco trustees or anyone at ERM that any

1 risk assessment or risk evaluation prepared in
2 connection with the RI/FS was being prepared in
3 order to address the existence of an imminent
4 and substantial endangerment?

5 MR. TENENBAUM: Objection. No foundation.
6 You are asking a different question.

7 MR. FINCH: I am also asking about a
8 communication between Mr. Poice and the Midco
9 trustees and ERH.

10 I am not asking about --

11 MR. TENENBAUM: You asked about the RI/FS
12 now.

13 MR. FINCH: I asked about the RI/FS in order
14 to make clear the connection in which my
15 question was framed.

16 MR. TENENBAUM: This has nothing to do with
17 whether or not the RI/FS evaluation was
18 performed to demonstrate the existence of an
19 imminent and substantial endangerment.

20 MR. FINCH: Alan, you are now arguing the
21 meaning of Exhibit 50. I am not a judge. I am
22 only a lawyer. Mr. Poice is a witness.

23 I want to know what he thinks about
24 this subject matter, not how you would

1 characterize it.

2 MR. TENENBAUM: He already said what the
3 statement pertained to.

4 You have in your question adopted an
5 assumption or premise which was different than
6 the witness answered. So I will object on the
7 grounds it assumes facts not to evidence and no
8 foundation.

9 MR. FINCH: There is no assumption built
10 into my question at all. It is just a simple
11 question.

12 Would the reporter please read it back
13 to the witness.

14 (The question was read.)

15 MR. TENENBAUM: Same objection. Vague and
16 ambiguous, incomprehensible. If you can
17 understand, you can answer it.

18 A. You are asking whether ERM, if I
19 specifically told ERM that anything in the risk
20 assessment could be used in documenting an
21 imminent and substantial endangerment at the
22 site?

23 BY MR. FINCH:

24 Q. That's close enough.

1 A. Okay.

2 As far as I can remember, I never
3 specifically told ERM that.

4 Q. How about the Midco trustees?

5 A. No, I never told them that.

6 Q. Did you ever use the phrase imminent
7 and substantial endangerment in alluding to any
8 risk assessment or risk evaluation?

9 MR. TENENBAUM: Same continuing objection.

10 A. In what?

11 NY MR. FINCH:

12 Q. In alluding to any risk assessment or
13 risk evaluation.

14 A. You mean when I reviewed comments on
15 their risk assessment or their risk evaluation?

16 Q. Yes.

17 A. No.

18 Q. Did you ever advise the Midco trustees
19 or ERM that there was a question of imminent and
20 substantial endangerment to be addressed at all
21 through the RI/FS process?

22 A. Did I personally advise them of that?

23 MR. TENENBAUM: Same continuing objection.

24 MR. FINCH: Yes.

1 A. Okay.

2 Well, it is evident in a lot of EPA
3 guidance documents that the risk assessments are
4 used to determine whether an imminent and
5 substantial endangerment exist at the site.
6 But, I don't think I specifically told them
7 that.

8 Q. Please take a look at statement number
9 2 in Part II of Exhibit 50. Do you see that,
10 Mr. Boice?

11 A. Uh-hum.

12 Q. It would be easier for the reporter if
13 you were to answer yes or no.

14 A. That's correct.

15 Q. Is there anything in statement number 2
16 as quoted in Exhibit 50 that had a role to play
17 in the impression of bad faith to which you have
18 previously testified?

19 A. I would say no. It just indicates that
20 they didn't review the risk assessment very
21 thoroughly.

22 Q. It indicates they didn't review the
23 risk assessment thoroughly or that they didn't
24 share your understanding of the meaning of the

1 risk assessment?

2 A. That they didn't review the risk
3 assessment thoroughly. They didn't understand
4 how it was done.

5 Q. Is there a difference between not
6 reviewing a document thoroughly and not
7 understanding how a document or a procedure
8 evinced in a document was done?

9 A. Well, basically my impression is from
10 this -- is that they didn't review the document
11 thoroughly enough to prepare this comment. And
12 so they wrote something that was basically
13 incorrect. And they are saying the risk
14 assessment conducted by PRC made certain
15 assumptions and that those statements are
16 incorrect.

17 Q. And the only explanation for these
18 incorrect statements is a failure to review a
19 document thoroughly?

20 A. You are asking about my impression,
21 right?

22 MR. TENENBAUM: Not only is there no
23 foundation, you are asking him for what somebody
24 else had in their mind. But, he already said

1 this wasn't part of his impression of bad faith,
2 I think.

3 A. Right.

4 MR. TENENBAUM: So why don't we move on?

5 BY MR. FINCH:

6 Q. Please look at statement number 3 in
7 Part II of Exhibit 50, and tell me whether that
8 statement as quoted in this exhibit had a role
9 to play in the impression of bad faith to which
10 you have previously testified?

11 A. I would say no, that it is -- just I
12 think reflects a lack of understanding by ERM of
13 risk assessment information.

14 Q. Okay.

15 So the record I clear, you are saying
16 that the conclusions that were made by ERM about
17 the soil ingestion rate that was utilized by the
18 Agency were conclusions that you do not have the
19 impression were reached in bad faith?

20 A. You mean the statement they made, you
21 are saying that the statement they made, whether
22 or not that contributed to my impression of bad
23 faith. I would say no.

24 Q. Okay.

1 The statement made that the risk
2 evaluation is incorrect according to a statement
3 document that is quoted in statement number 3
4 also had no role to play in your impression of
5 bad faith?

6 A. I said that entire statement, statement
7 number 3.

8 Q. Had no role to play in your impression
9 of bad faith?

10 A. That is what I said.

11 Q. Okay.

12 Let's look at statement number 1 in
13 Part II of Exhibit 50. Does that statement as
14 quoted in Exhibit 50 have any role to play in
15 your impression of bad faith?

16 A. I think that probably contributed to my
17 impression along with all the other performance
18 problems of ERM.

19 Q. Okay.

20 Let me quote for the record what
21 statement number 4 is. Quote:

22 "The last sentence
23 of paragraphs W or X of
24 Section IV of the 106 order

1 for Midco I or Midco II,
2 respectively, implies that
3 the salt found at the sites
4 is related to the Midco
5 activities. This is
6 incorrect."

7 How did that statement or in what
8 respect did that statement have a role to play
9 in your impression of bad faith?

10 A. Okay.

11 Do you have a copy of the unilateral
12 administrative order?

13 Q. I probably do.

14 Can you answer my question without
15 referring to that copy?

16 A. Well, I think if you look at that you
17 will see that all we said is that some of the
18 salt contamination may have been contributed by
19 Midco I site or the Midco I operation.

20 Q. Midco I operation, what do you mean by
21 that?

22 A. Well, okay.

23 Well, he says right here, the statement
24 for the -- the last sentence implies that salt

1 found at the site is related to Midco
2 activities. He didn't --

3 What we said is that we thought some
4 the salt may have come from the Midco
5 activities. Yes.

6 Q. Okay.

7 A. But, the way he says it, it is like
8 is implying that we are implying that all the
9 salt came from the Midco activities and we are
10 not implying that.

11 We didn't indicate that in the
12 unilateral administrative order.

13 Q. You say he. Who is he?

14 A. Whoever prepared the comments for ERM.
15 I guess Roy Ball and Elsie Millano.

16 Q. That is you mean when you say he?

17 A. In this particular instance, situation
18 yes, that is what I meant.

19 Q. You say Midco activities. I am not
20 sure I know what is meant by that phrase.

21 MR. TENENBAUM: Is that his phrase, is that
22 in the order?

23 A. That was my phrase. It is probably not
24 in the order. I guess I should say the Midco I

1 and Midco II sites.

2 BY MR. FINCH:

3 Q. Did you mean the manner in which the
4 sites were operated and maintained or do you
5 mean something else?

6 A. I will revise my statement to mean the
7 Midco I and Midco II sites themselves.

8 Q. All right.

9 So explain to me how this statement had
10 a role to play in your impression of bad faith?

11 A. I just did.

12 Q. I understand how you disagree with the
13 statement, but I don't understand why you
14 conclude that that disagreement may have evinced
15 bad faith.

16 A. Well, they are misstating what we said
17 in the unilateral order.

18 Q. So the record is clear, they are
19 misstating it because you think they were
20 implying that all of the salt found at the sites
21 was related to the sites, and you understand the
22 106 orders on the other hand to have stated only
23 that some of the salt found at the sites may be
24 related to the sites?

1 A. I couldn't follow you, your statement.

2 Q. All right.

3 I want to make sure I understand what
4 you are testifying to, Mr. Boice, so let me
5 break this down.

6 Your understanding of what is meant by
7 the material quoted in statement number 4 is
8 that the drafter of that statement is accusing
9 EPA of implying that all of the salts found at
10 the Midco sites is related to Midco activities;
11 is that correct?

12 A. I think what I said before, and I think
13 I already made it clear, is that they misstate
14 what EPA put in their unilateral order.

15 Q. I am not sure I understand how they
16 misstated what EPA put in the unilateral order?

17 A. Well, if we get the order, we can read
18 what is in the order and you can read this
19 sentence and you can see how it was misstated.

20 Q. I want to know what your understanding
21 is as you sit here now.

22 MR. TENENBAUM: Only if you are able to do
23 that from memory.

24 If you are unable to do it without

1 looking, then you have to tell him that.

2 A. I think I already answered it.

3 They indicated or I should say ERM
4 indicated in their statement number -- this --
5 in their comments on our unilateral order that
6 the unilateral order implies that the salt found
7 at the Midco sites is related to the Midco
8 activities.

9 When actually what we said is, I am
10 pretty sure the unilateral order says that Midco
11 activities also could have contributed -- or
12 Midco activities, the Midco sites could have
13 contributed to some of the -- to some of the
14 salt contamination.

15 BY MR. FINCH:

16 Q. So what is the difference?

17 A. That is based off the top of my head.

18 Q. What is the difference?

19 A. If you want to be more perfect, we can
20 look into the unilateral order itself.

21 Q. The order I am sure speaks for itself.
22 I want to know the difference between -- I don't
23 understand the difference between your
24 characterization of what the drafter of

1 statement 4 said about the salt and your
2 characterization of what the administrative
3 order says about the salt. They sound the same
4 to me.

5 A. Well, as I said before, the order says
6 that some of the salt could have come from the
7 Midco sites, and in statement 4 they seem to
8 imply that we are saying that all the salt came
9 from the Midco activities.

10 Q. Okay.

11 A. There is a difference.

12 Q. The difference between some of the salt
13 on the one hand and all of the salt on the other
14 hand, right?

15 A. Yes.

16 Q. Okay.

17 Do you know where the salt at the Midco
18 site came from?

19 (Conference between the witness and his
20 counsel.)

21 MR. TENENBAUM: He is going on to another
22 subject. He is allowed to ask questions about
23 the salt, assuming that they relate to the
24 liability issues.

1 MR. FINCH: Yes. The salt does relate to
2 liability.

3 A. That we have information on is that at
4 Midco I it appears very likely that a portion of
5 the salt, possibly a large portion, came from
6 run-off from the Indiana Department of Highways'
7 facility.

8 Also we have some information on
9 disposal of chlorine-containing wastes at the
10 Midco sites.

11 Q. Chlorine or chloride?

12 A. Chlorine. Chloride.

13 For example, a Minnesota firm was
14 reported to have dumped pickle liquor at the
15 Midco I site in the Robinson deposition.

16 And at Midco II information we have
17 suggests -- or, not only suggests, we have
18 depositional evidence that US Reduction dumped
19 aluminum waste, some type of high aluminum waste
20 at the Midco II sites. That is also high in
21 chlorides.

22 And that probably contributed to the
23 chloride contamination at Midco II and possibly
24 the other Midco operations, where the disposal

1 during the Midco operations also contributed to
2 that.

3 Q. Did USEPA consult records maintained by
4 the Indiana Department of Health, later renamed
5 the Indiana Department of Environmental
6 Management, in order to determine sources of
7 salt contamination at the Midco I and Midco II
8 sites?

9 MR. TENENBAUM: Not IDOH records, just IDEM
10 records.

11 A. IDEM records?

12 BY MR. FINCH:

13 Q. Right.

14 A. Just records we have in our own files.

15 Q. How did they get there? How did those
16 records get there?

17 A. What records?

18 Q. The ones to which you just testified.

19 A. Would you repeat the question?

20 MR. TENENBAUM: He wants to wants to know
21 whether you consulted IDEM records in your file
22 in connection with determining the origin of
23 salt found out at the site.

24 A. Okay.

1 We have some IDEM records in our files.
2 But, I don't think they contributed to our
3 understanding of the salt contamination.

4 BY MR. FINCH:

5 Q. Do they contribute to your
6 understanding of the sources of the salt
7 contamination?

8 A. Not IDEM records, no.

9 Q. Any records from any Indiana
10 governmental agency, such as Indiana Department
11 of Highways or Department of Transportation?

12 A. Yes. The Indiana Department of
13 Highways, we have their 104 E response to our
14 104 E request.

15 Q. How did the Agency learn about US
16 Reduction aluminum wastes at Midco II?

17 A. Okay.

18 Well, the RI showed that there were
19 high aluminum in the soils. And we had a
20 description, verbal description, that it looks
21 like this is some type of secondary aluminum
22 smelting waste.

23 So we looked, up the only secondary
24 aluminum facility in the area is US Reduction.

1 In addition to that, there is the
2 Robinson deposition that states that US
3 Reduction wastes were dumped or used for filling
4 on the Midco II site.

5 Q. Other than the Robinson deposition --

6 A. Or around the Midco II site.

7 Q. Other than the Robinson deposition in
8 the fact that you identified US Reduction as a
9 aluminum waste or aluminum smelting facility in
10 the area, does the Agency have any information
11 connecting US Reduction's aluminum wastes to
12 Midco II?

13 A. Well, we have the -- we have their
14 response to our 104 B request, information
15 request.

16 Q. And you read that response as
17 indicating that US Reduction sent aluminum
18 wastes to Midco II?

19 A. No. It indicates they generated
20 aluminum waste.

21 And, of course, then connecting that to
22 the other deposition, or the other -- the
23 depositional evidence and the other information,
24 there is additional evidence that since they

1 generated high aluminum waste, that it could
2 have gone to the site.

3 Q. What other information?

4 A. Which other information are you
5 referring to?

6 Q. You just alluded to other information,
7 in addition to the Robinson deposition and the
8 104 E response submitted by US Reduction, on the
9 basis of which EPA concluded that US Reduction
10 sent aluminum waste to Midco II.

11 A. Right. The verbal, the visible
12 description of it.

13 Q. Visible description.

14 A. By the remedial investigation
15 contractor and the analytical results in the
16 remedial investigation.

17 Q. Okay.

18 Visible description of the remedial
19 investigation contractor.

20 Description of what?

21 A. Of the wastes, of the fill material at
22 the Midco II site.

23 Q. So the remedial investigation
24 contractor took a look at the fill materials at

1 the site and concluded that they were aluminum
2 wastes?

3 A. Well, he suggested it.

4 Q. He suggested it. Okay.

5 Who is he?

6 A. Bob Aten.

7 Q. Did he say anything about US Reduction?

8 A. I think he did. Yes.

9 Q. Mr. Aten told EPA that these were US
10 Reduction wastes?

11 A. No. That US Reduction -- he only told
12 us, I think he said that he thought US Reduction
13 was the only secondary aluminum smelting
14 facility in the area.

15 Q. So, it is your understanding that Mr.
16 Aten determined who the secondary aluminum
17 smelting waste generators were in the area and
18 concluded that US Reduction was the only one?

19 A. No. I think he just had general
20 information.

21 Q. Just general information?

22 A. Then we verified it.

23 Q. You verified that information?

24 A. Yes.

1 Q. Did Mr. Aten tell you that there was
2 anything about the nature of the aluminum fill
3 material that he suggested could be found at
4 Midco II that linked that material to US
5 Reduction?

6 A. Well, he said it looked gray, I think,
7 and ash like. And I don't know why, but he
8 thought that it might be related to --

9 Well, I guess as far as connecting it
10 to US Reduction, I would say no. That's right.
11 No.

12 Q. All right.

13 Did you communicate at all, Mr. Boice,
14 with any officials of the Indiana Department of
15 Environmental Management about the possibility
16 that groundwater from the Midco I or Midco II
17 sites could be discharged to a POTW?

18 MR. TENENBAUM: How is this related to
19 non-record issues?

20 MR. FINCH: Actually this question is not
21 related to a non-record issue.

22 But, so that I can make a record,
23 officials of the Indiana Department of
24 Environmental Management have testified in

1 deposition about communications with Mr. Poica
2 and others at USEPA on this issue.

3 And I just want the record to be clear
4 that notwithstanding EDEN's willingness to
5 testify about these items, you are still
6 instructing the witness not to answer the
7 questions.

8 MR. TENENBAUM: Can the reporter read the
9 question?

10 MR. PERMAN: Can you repeat the question,
11 please.

12 (The record was read.)

13 BY MR. FINCH:

14 Q. Are you willing to answer that
15 question?

16 MR. TENENBAUM: One second.

17 It seems that that is a record issue,
18 that is part of our pending motion before the
19 court.

20 MR. FINCH: Okay.

21 I just want to be clear, we are talking
22 about communications with individuals outside of
23 the ambit of USEPA, individuals who are willing
24 to testify to these communications and see no

1 privilege or other basis upon which to issue
2 instructions not to answer.

3 MR. TERNERBAUM: As you know, our objections,
4 grounds for our objections and instructions in
5 this regard are not the assertion of a simple
6 privilege, but they are a much broader based
7 issue.

8 MR. FINCH: All right. I just want to make
9 a record on this point, Alan.

10 I had intended to ask Mr. Boice a
11 series of questions relating to the following:
12 Communications between Mr. Boice and IDEM
13 officials over the propriety of a discharge
14 point or the propriety of discharge to a POTW.

15 Communications between Mr. Boice and
16 IDEM officials over the appropriate standards
17 for the giving of a permit for such a discharge

18 Communications between Mr. Boice and
19 officials of IDEM relating to the manner in
20 which salt contamination could otherwise be
21 addressed.

22 Do I understand, Alan, that had I asked
23 any of these questions, you would have made the
24 objections you have made to discovery seeking

1 information on record compilation or remedial
2 action selection and would further have
3 instructed Mr. Boice not to answer these
4 questions?

5 MR. TENENBAUM: Yes.

6 As we have indicated in our motion for
7 protective order, the record contains sufficient
8 information; it is our understanding that the
9 record contains sufficient information on these
10 areas in connection with the Agency
11 decision-making process.

12 Of course, as I have indicated
13 repeatedly throughout the course of these
14 depositions and in our papers, if any of the
15 defendants are aware of any documents or other
16 information that may have been inadvertently
17 omitted from the record in this connection, or
18 in any other connection, they should bring that
19 to our attention as soon as possible.

20 And if we find that they are right
21 through some oversight, then we will take
22 whatever steps are necessary to make sure that
23 this information is before the court prior to
24 November.

1 So far we have not received any
2 correspondence from any defendants suggesting
3 that something is my missing.

4 We did receive some motion from some of
5 the defendants which identified a couple, a
6 handful, or two or three documents that they
7 thought belonged in the record and we are going
8 to look at those, see what the story is on them.

9 But, to my understanding, none of those
10 related to the line of questioning that you
11 proposed. No specific documents have been
12 identified.

13 If you are aware of anything that
14 belongs in the record in that area, please bring
15 that to our attention and we will respond
16 accordingly.

17 BY MR. FINCH:

18 Q. So the record is clear, Mr. Boice, had
19 instructions not to answer questions been made
20 by Mr. Tenenbaum, you would have obeyed those
21 instructions and not answered the questions?

22 A. Yes.

23 Q. All right.

24 On that basis, I am not going to ask

1 specific questions in the subject matter areas
2 outlined a minute ago.

3 And I will like it, Alan, you will
4 stipulate that I have preserved for review by
5 the court any issue we may have with your
6 position on whether this is discoverable
7 material?

8 MR. TENENBAUM: As long as you are willing
9 to similarly to stipulate with respect to our
10 deposition last week, on the issues where you
11 did not produce a witness and indicated you
12 would have instructed your witness not to answer
13 my questions. If you will give me the same
14 stipulation, I will be glad to give you that
15 stipulation.

16 MR. FINCH: I can't give you a stipulation
17 today, August 1, with respect to something that
18 happened on the record in a deposition that
19 occurred ten days ago or whenever.

20 MR. TENENBAUM: You were at the deposition
21 and if you can't extend that same courtesy,
22 which I would expect that you would have
23 extended, then I am not going to extend it here.
24 But, I thought that you would.

1 MR. FINCH: All right. Let's go off the
2 record for a second.

3 (Discussion had off the record.)

4 Go back on the record.

5 I will stipulate that in the
6 Government's 30 (b) 5 deposition of Standard T
7 that took place last week, the government made
8 an adequate record to show the line of questions
9 it wished to pursue against Standard T, as to
10 which we interposed various objections.

11 MR. TENENBAUM: Okay. Will do the same
12 here.

13 Just for the record on another point,
14 we are not conceding that the State of Indiana
15 has permitted discovery on these communications.
16 I was not at those depositions, so I can't
17 really state whether your recitation of what
18 happened is true or not.

19 MR. FINCH: Well, the record of those
20 depositions speaks for itself.

21 There is no sense in arguing about what
22 happened in those depositions. The record is
23 quite clear.

24 Q. Mr. Boice, I call your attention to

1 Part I of Exhibit 50. Please look at the
2 statement under caption 1 which reads as
3 follows:

4 "The information in
5 the record does not
6 demonstrate that there may
7 be an imminent and
8 substantial endangerment to
9 the public health or welfare
10 or the environment because
11 of an actual or threatened
12 release of a hazardous
13 substance from the sites.

14 "The administrative
15 orders are not based on
16 valid findings of an
17 imminent and substantial
18 endangerment to the public
19 health or welfare or the
20 environment and therefore
21 exceed EPA's authority under
22 Section 106 of CERCLA."

23 That evidently is a synopsis of various
24 comments made by ERM and various 106

1 respondents, and does not purport to be a direct
2 quotation from any such response.

3 Mr. Boice --

4 MR. TENENBAUM: It is followed with a couple
5 quotations.

6 MR. FINCH: I know it is, but I am only
7 talking about this sentence now.

8 MR. TENENBAUM: Okay.

9 BY MR. FINCH:

10 Q. Mr. Boice, does the statement I just
11 read verbatim have any role to play in the
12 impression of bad faith to which you have
13 previously testified?

14 A. I would have to address the individual
15 parts regarding that question.

16 Q. Okay.

17 Let's take a look at comment 1A.
18 Please read that and tell me whether that
19 comment has had any role to play in the
20 impression of bad faith to which you have
21 previously testified?

22 A. Okay.

23 Well, previously we were talking only
24 about ERH and these comments were made by the

1 Midco respondents.

2 Q. Just so the record is clear --

3 A. ERM is in there.

4 Q. ERM is listed as among the commenters.

5 A. Okay. I guess you are right. Okay.

6 The first one:

7 "Apart from the

8 risks addressed by the

9 partial consent decree, the

10 risk to trespassers is the

11 principal risk identified by

12 the United States in

13 connection with the Midco

14 sites. Clearly, the risk to

15 trespassers does not

16 constitute an imminent and

17 substantial endangerment

18 within the meanings of

19 Section 106."

20 Q. Why don't we for the sake of clarity
21 address that sentence alone.

22 Does that sentence have any role to
23 play in the impression of bad faith?

24 A. I think the first sentence would.

1 Q. Okay.

2 That is, the sentence is follows,

3 quote:

4 "Apart from the
5 risks addressed by the
6 partial consent decree, the
7 risks to trespassers is the
8 principal risk identified by
9 the United States in
10 connection with the Midco
11 sites."?

12 A. That's correct.

13 Q. Okay.

14 How does that sentence have any role to
15 play in your impression of bad faith?

16 A. Well, the partial consent decree didn't
17 address any risks at the site. All it said was
18 to conduct an RI/FS. It studied the sites,
19 basically.

20 It didn't address any risks at the
21 site, other than payment of past costs, I guess.

22 Q. What do you mean when you say it did
23 not address any risks at the site?

24 A. Well, under the partial consent decree,

1 the respondents did two things. They paid for
2 some past costs and they conducted a remedial
3 investigation feasibility study. That doesn't
4 address any risks at the site, it only studies
5 the site.

6 Q. When you say address, do you mean make
7 findings or conclusions?

8 A. Addressed in the context used in the
9 sentence, addressed means that it is taken care
10 of or it is covered, taken away. That was my
11 interpretation of the sentence.

12 Q. So you don't see the word addressed as
13 implying subject matter. You see the word
14 addressed as implying taking care of or
15 eliminating?

16 A. Uh-hum.

17 Q. By uh-hum, do you mean yes?

18 A. That was my interpretation. Yes.

19 Q. And on the basis of that
20 interpretation, this sentence had a role to play
21 in your impression of bad faith?

22 A. Yes. Along with all the other
23 performance problems of ERM.

24 Q. Okay.

1 What about the second sentence, quote:

2 "Clearly, the risk
3 to trespassers does not
4 constitute an imminent and a
5 substantial endangerment
6 within the meaning of
7 Section 196."

8 Does that sentence have any role to
9 play in your impression of bad faith?

10 A. No.

11 Q. What about the third sentence, quote:

12 "There is no
13 evidence that a trespasser
14 on industrial property would
15 scale a fence, dig through a
16 cover and then eat
17 contaminated dirt or drink
18 contaminated groundwater...
19 anywhere."

20 Does that sentence have any role to
21 play in your impression of bad faith?

22 A. Yes, I think so.

23 Q. How?

24 A. Well, it says there is no evidence, but

1 in a risk assessment, we don't use direct
2 evidence, we use reasonable probabilities.

3 Q. What do you mean by -- I am sorry.

4 A. Unless it actually happens, how do you
5 prove that it will happen. Something like the

6 Q. Okay.

7 A. We use reasonable probability.
8 reasonable, I guess, possibilities.

9 Q. Reasonable possibilities or reasonable
10 probabilities?

11 MR. TENENBAUM: Same continuing objection.

12 A. Basically we use reasonable worst-case
13 scenarios.

14 BY MR. FINCH:

15 Q. Is that a reasonable probability or a
16 reasonable possibility?

17 A. I don't know.

18 Q. You don't know which one it is?

19 MR. TENENBAUM: Same continuing objection.
20 Also may seek expert testimony.

21 A. I think it is reasonable possibility.
22 Yes.

23 BY MR. FINCH:

24 Q. Why do you use a reasonable worst-case

1 scenario?

2 MR. TENENBAUM: Wait a second.

3 This is now seeking discovery on record
4 issues. I will have to instruct the witness not
5 to answer that. It is also seeking expert
6 testimony, if it turns out to be a non-record
7 issue.

8 This is not noticed as an expert
9 deposition.

10 BY MR. FINCH:

11 Q. So if I understand your comment, Mr.
12 Boice, you find bad faith in the statement that
13 there is no "evidence" that a trespasser would
14 scale a fence and dig through the cover because
15 the notion of evidence is irrelevant to the
16 calculation of a reasonable worst-case scenario?

17 MR. TENENBAUM: Can you read that back,
18 please.

19 (The record was read.)

20 Same continuing objection.

21 A. Well, first of all, it is my testimony,
22 it is not my comment.

23 And also, as I have been testifying
24 throughout this, it is my impression of bad

1 faith. And I think the way it is worded here
2 suggests that we have to have some type of
3 concrete evidence that this will actually
4 happen.

5 And I think -- I think that contributes
6 to my impression of their performance.

7 BY MR. FINCH:

8 Q. Because you don't have to have any
9 evidence that this would actually happen?

10 A. It has to be based on some reasonable
11 worst-case scenario, which is based on -- there
12 are certain standard assumptions on the amount
13 of soil that might be ingested in one sitting.
14 There is probably some evidence for that.

15 Q. Sitting or setting?

16 A. What?

17 Q. Was your word sitting or setting.

18 MR. TENENBAUM: Sitting or setting?

19 BY MR. FINCH:

20 Q. Ingested in one --

21 A. In one.

22 Q. -- sitting or setting?

23 A. One, at one time.

24 Q. All right.

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MR. TENENBAUM: Let's --

A. Also there is other standard assumptions that there is evidence for.

MR. TENENBAUM: Let's avoid getting into these expert or record issues and so forth, and so on.

MR. FINCH: All right.

I just want to know whv he says this is bad faith.

MR. TENENBAUM: I thought he already answered that.

A. Plus the bad faith, I mean it is not just this one statement. It is the overall performance over a few years.

BY MR. FINCH:

Q. Right, I understand.

Please take a look at comment 1st which follows two pages later.

Do you see that?

A. Uh-hum.

Q. Does that mean yes?

A. Yes.

Q. I quote the first sentence:

1 "We specifically
2 contend that there are no
3 facts indicating that any
4 significant endangerment
5 that may be posed by the
6 Midco I or Midco II site
7 needs to be addressed with
8 any degree of urgency."

9 Does that sentence have any role to
10 play in your impression of bad faith?

11 MR. TENENBAUM: Well, let me add to my
12 additional objections previously stated on this
13 one. It seems that this objection, at least
14 reading the response, is a legal question.

15 Let me just read it for a second.

16 MR. FINCH: Sure.

17 MR. TENENBAUM: It seems me that all of
18 comment 1B pertains to either legal
19 interpretation of the imminent and substantial
20 endangerment phrase in the statute or expert
21 testimony issues.

22 And the witness is not a lawyer and
23 this is not an expert deposition. But, if you
24 want to ask him whether apart from legal

1 interpretations and expert testimony about
2 imminent substantial endangerment, there is any
3 part of this that has something to do with his
4 impression of bad faith, then I will let him
5 answer that.

6 MR. FINCH: I am not sure I understand your
7 point, Alan.

8 If this witness has an impression of
9 bad faith directed toward ERM or any of the
10 defendants in this case, and if that impression
11 happens to rest on his view of what he thinks
12 the law is, we are entitled to know it.

13 Obviously, we are not entitled to ask
14 him for a legal opinion on behalf of EPA. And
15 we are not entitled to ask him for his expert
16 opinion on behalf of EPA or otherwise; but, we
17 are entitled to know absolutely everything about
18 his impression of bad faith, even if part of
19 that impression flows from a legal
20 interpretation that he has personally made of
21 something connected with this lawsuit.

22 If you want to issue instructions not
23 to answer, I can't stop you, Alan, but I really
24 don't understand your point at all.

1 MR. TENENBAUM: I am just trying to expedite
2 this, and it seemed to me the question on this
3 comment is a waste of time.

4 But, I am not going to instruct him not
5 to answer. If he knows the answer, he can
6 answer.

7 MR. FINCH: All right, fine.

8 We are talking now about the first
9 sentence in comment 1B.

10 MR. TENENBAUM: Subject to my objections.

11 MR. FINCH: Right. The first sentence of
12 comment 1B, that was read into the record.

13 A. I would say with all three of these.

14 Q. I haven't read the other two yet.
15 Let's just start with one. Then we will go on
16 from there.

17 A. I would say no, because my impression
18 is that is a negotiating position on the part of
19 the respondents.

20 Q. Okay.

21 Is it your testimony that the following
22 two sentences also had no role to play in your
23 impression of bad faith?

24 A. Yes.

1 Q. Okay.

2 (Whereupon a short recess was taken.)

3 Back on the record.

4 Please look at comment 10 at page 1 of
5 Exhibit 50, and tell me whether the statement
6 contained in that comment had a role to play in
7 your impression of bad faith?

8 A. Okay.

9 This is similar to the previous
10 comment. Well, I can't see it now. But, again
11 they are saying that the imminent and
12 substantial endangerment that may have been
13 posed by the Vidco sites was fully addressed by
14 the partial consent decree entered in 1985.

15 And the way it is worded, it sounds
16 like they mean that all the other risks were
17 eliminated by the -- by some action conducted
18 under the partial consent decree. And that's
19 not true.

20 All the partial consent decree, all
21 that was done under the partial consent decree
22 was to reimburse costs and conduct the remedial
23 investigation feasibility study at each site,
24 which doesn't eliminate any risks. It only

1 evaluates the site.

2 Q. That is your understanding?

3 A. Yes.

4 So that, yes, I think in the same way
5 as the previous statement that I addressed on
6 this subject.

7 Q. Are you testifying that you don't
8 understand the partial consent decree to have
9 addressed surface clean up?

10 MR. TENENBAUM: To require an actual clean
11 up, is that your question?

12 MR. FINCH: To address surface clean up.

13 MR. TENENBAUM: What do you mean by address?
14 You mean the cost or actual clean up or what?

15 MR. FINCH: As a subject matter of the
16 partial consent decree, the question of surface
17 clean up.

18 MR. TENENBAUM: To the extent it is
19 ambiguous, I will object.

20 You can answer.

21 A. Okay.

22 Well, I guess I have to change my
23 answer on that, since I didn't notice that it
24 also says the partial consent decree and the

1 surface clean up.

2 So, based on that, I guess it is
3 just -- it wouldn't contribute to my impression
4 of bad faith based on that.

5 Q. All right.

6 A. They are just expressing their opinion.

7 Q. Look at comment 10, the first sentence
8 which reads as follows, quote:

9 No one engaged in
10 the just-concluded four
11 months of
12 negotiation...mentioned any
13 imminent and substantial
14 danger arising from or
15 threatened by the Midco
16 sites."

17 Does that sentence play any role in
18 your impression of bad faith?

19 A. I don't think this statement is
20 significant, but no, it didn't.

21 Q. How about the following statement, the
22 following sentence?

23 A. Yes. I think that would contribute to
24 my impression of bad faith.

1 Q. Let the record reflect the statement at
2 issue, then. It is, quote:

3 "These assertions
4 are all new. They are not
5 addressed in the ROD or the
6 RI/FS."

7 And so that the record is clear, the
8 phrase "these assertions" appear to allude to
9 assertions of imminent and substantial danger
10 arising from or threatened by the Midco sites.

11 Now, please explain, Mr. Boice, how
12 this sentence plays a role in your impression of
13 bad faith?

14 A. Well, the ROD and the RI/FS clearly
15 indicates and evaluates the risks from the site.

16 So all we did in the unilateral
17 administrative order was to recite those risks
18 identified in the remedial investigation
19 feasibility study, and that are also summarized
20 in the record of decision.

21 And so the information, which are
22 certainly the basis of the assertions in the
23 unilateral administrative order, was all --
24 certainly not new. It was always available in

1 the ROD and in the remedial investigation
2 feasibility study.

3 Q. What about imminent and substantial
4 danger, is that addressed in the ROD or the
5 RI/FS?

6 A. That particular statement is not made.
7 Although, in the first amended complaint, it was
8 noted that the government stated that there may
9 be an imminent and substantial endangerment at
10 the site.

11 Q. Is it your understanding that the fact that
12 the RI/FS concludes that there is an imminent
13 and substantial endangerment at either of the
14 sites?

15 MR. TENENBAUM: Same continuing objection.

16 A. As I stated before, the remedial
17 investigation feasibility study contains a lot
18 of documentation and that documentation
19 indicates that there is an imminent and
20 substantial endangerment at the site.

21 Q. You say indicates that there is an
22 imminent and substantial endangerment.

23 What do you mean by the word
24 "indicates"?

1 A. Provides the basis, the information
2 towards the conclusion that there is an imminent
3 and substantial endangerment at the site.

4 Q. The Agency's conclusion?

5 A. Yes.

6 Q. Is it your testimony that the RI/FS
7 itself concludes that there is an imminent and
8 substantial endangerment at either of the sites?

9 MR. TENENBAUM: Same continuing objection.

10 A. It doesn't specifically state that.

11 MR. FINCH: Off the record.

12 (Discussion had off the record.)

13 MR. FINCH: Could you read the last
14 response, please.

15 (The record was read.)

16 Q. Does it imply that in your judgment?

17 A. It --

18 The RI/FSs do not address legal
19 conclusions, including whether an imminent and
20 substantial endangerment exists at the site.

21 Q. Is it your understanding that the
22 existence of an imminent and substantial
23 endangerment is a legal conclusion?

24 MR. TENENBAUM: Same continuing objection.

1 A. It is largely a legal conclusion.

2 BY MR. FINCH:

3 Q. Is it in any respect not a legal
4 conclusion?

5 MR. TENENBAUM: Now we are on a question of
6 are asking which has gone adrift from the
7 impression of bad faith, the impression of bad
8 faith issue, it has gone adrift of that. You
9 are now asking for the basis of the Agency's
10 findings.

11 MR. FINCH: No. I am not even remotely
12 asking him about the Agency's findings.

13 I am trying, somewhat desperately, to
14 understand this witness' reasoning in his
15 conclusion that the sentence at issue evinces or
16 partially evinces the bad faith to which he has
17 previously testified.

18 And I am using, Alan, the words that he
19 has used in trying to find out why he is using
20 those words.

21 MR. TENENBAUM: I think that he has already
22 answered your question two or three times.

23 MR. FINCH: I don't understand his answer,
24 and I am trying to parse through it so I can

1 understand the answer.

2 MR. TENENBAUM: Anyone reading the record
3 would see that he has now answered it two or
4 three times.

5 If you want him to try again, he will
6 try again. But, I would object to this
7 repetitive process of asking the same question
8 again.

9 BY MR. FINCH:

10 Q. I just want to be clear on one point,
11 Mr. Boice.

12 You are not testifying, are you, that
13 the drafters of the RI/FS concluded that there
14 was an imminent and substantial endangerment at
15 either of the Midco sites, are you?

16 A. Who do you mean by the drafters, do you
17 mean ERM --

18 Q. Whoever drafted the RI/FS.

19 A. -- or Dames & Moore?

20 No.

21 MR. TENENBAUM: By this, you mean in
22 connection with his impression of bad faith,
23 right? Is that what your question was?

24 MR. FINCH: I am confused.

1 MR. TENENBAUM: You may have inadvertently
2 said something about -- your question may have
3 presumed this was his statement or something.

4 MR. FINCH: No. No. It is not his
5 statement at all. It is a statement upon which
6 he is, at least in part, drawing an impression
7 of bad faith.

8 MR. TENENBAUM: All right.

9 BY MR. FINCH:

10 Q. Please take a look at comment 17 in
11 Part I of Exhibit 50.

12 This is a somewhat lengthy comment
13 running from the bottom of the page on which it
14 first appears and starting on the next
15 unnumbered page on which it appears, and tell me
16 whether anything in that comment has formed a
17 part of your impression of bad faith?

18 Off the record.

19 (Discussion had off the record.)

20 Back on the record.

21 A. No.

22 Q. No.

23 So this statement has had no role to
24 play in your impression of bad faith?

1 A. No.

2 Q. Please look at comment 1F and tell me
3 whether that comment has had any role to play in
4 your --

5 A. There is a second portion of 1F, if you
6 want to go over that.

7 Q. Second portion.

8 A. I was only answering for the first
9 portion.

10 Q. Okay.

11 Please tell me as to anything in 1F.

12 A. No.

13 Q. All right.

14 A. No.

15 Q. And 1F?

16 A. We don't agree with what they are
17 saying, but no.

18 Q. So this commented no role to play in
19 your impression of bad faith?

20 A. No.

21 Q. All right.

22 I want to call your attention to a
23 portion of Exhibit 50 that is kind of hard to
24 locate, as this exhibit is not page numbered at

1 all. They are comments under the caption.

2 "Comments from eight generators and the operator
3 at the site." A section of material immediately
4 following Part II or perhaps --

5 A. Yes.

6 Q. A part of Part II, it isn't clear.

7 Do you see that?

8 A. Uh-hum.

9 Q. By uh-hum, you mean yes?

10 A. Yes.

11 Q. All right.

12 Look at comment number 1, there are
13 what appear to be selective quotations, five in
14 all?

15 A. Uh-hum.

16 Q. Do you see that?

17 A. Uh-hum.

18 Q. By uh-hum, you mean yes?

19 A. That's correct.

20 Q. All right.

21 Please look at the first comment, which
22 purports to be one made by someone named Barker.
23 I won't read it in the record to save time.

24 But, could you tell me whether that

1 comment has a role to play in your impression of
2 bad faith?

3 A. I would say yes.

4 Q. Okay.

5 Let the record reflect that the comment
6 reads as follows, quote:

7 "Issuance of the
8 orders is an unfounded
9 extension of the recent bad
10 faith with which Agency
11 personnel jettisoned the
12 settlement efforts of the
13 Midco Steering Committee."

14 Please tell me how this statement has a
15 role to play in your impression of bad faith?

16 A. Well, this has to do with the
17 negotiation period following the referenced
18 decision.

19 And Mr. Harker accused the Agency and I
20 guess the Department of Justice of bad faith in
21 the negotiations. And I thought that accusation
22 was completely unfounded.

23 Q. Why?

24 A. Because we always negotiated in good

1 faith. Our position was always the same, that
2 we had to implement the remedy as provided for
3 in the record of decision, and that is fairly
4 well known that that's the Agency's position in
5 negotiations.

6 Q. From which the Agency did not deviate
7 at any time in any respect during the
8 negotiations?

9 MR. TENENBAUM: Just a second.

10 I have to object to this discovery and
11 settlement negotiations. I am not going to
12 allow discovery into settlement negotiations.

13 MR. FINCH: So you are not going to allow
14 this witness to testify why he believes that
15 this particular statement from Tim Harker
16 evinces bad faith?

17 MR. TENENBAUM: I think he has already
18 testified to that.

19 MR. KEATING: He is saying that the
20 negotiations were in bad faith.

21 MR. TENENBAUM: No. He is saying that the
22 accusation that the negotiations were in bad
23 faith was itself in bad faith.

24 MR. FINCH: I want to explore why this

1 witness so concludes, and the only way I know
2 how to do that is to ask a series of follow-up
3 questions.

4 MR. KEATING: The only thing that you can do
5 if you say the guy is dealing in bad faith, you
6 have to be able to ask him why he thinks this is
7 dealing in bad faith.

8 MR. FINCH: Right.

9 A. I am only testifying of my impression
10 of bad faith.

11 MR. KEATING: Your impression is the one
12 that he is talking about of being in bad faith.

13 MR. TENENBAUM: Why don't we do this.

14 I don't know what the position of the
15 defendants is on whether they want to open up
16 depositions of all the defendants' attorneys and
17 non-attorneys regarding the settlement
18 negotiations.

19 I assume you haven't reached that
20 point.

21 Why don't we do this. If the Agency or
22 if the United States ever wishes in this case to
23 make a factual issue of whether or not the
24 accusation of bad faith was itself in bad faith,

1 then we will at that point set up a deposition
2 schedule on both sides.

3 At this point I don't think we should
4 take discovery into settlement negotiations
5 because those, as you know, are confidential
6 under the rules of evidence.

7 And if we are going to start taking
8 discovery into the settlement negotiations, that
9 is something that is not provided for in the
10 extension of discovery. That would require a
11 lot of discussion by all sides.

12 I don't think that you are prepared at
13 this point to open up discovery on settlement
14 negotiations and we are certainly not. I would
15 propose that we not --

16 MR. FINCH: I disagree, Alan.

17 We have never I think even implied that
18 settlement negotiations were not a fair ground
19 for discovery.

20 I would agree with you that typically
21 the communications that may have taken place in
22 the context of settlement negotiations are not
23 admissible for purposes of showing a concession
24 or admission by a party to a lawsuit.

1 But, where, as here, there are issues
2 of bad faith, including assertions of bad faith
3 by the defendant group against the United
4 States, assertions which formed a basis for a
5 motion filed in November by some of the
6 defendants, seeking protection under the partial
7 consent decree, as well as assertions of bad
8 faith by a government official against the
9 defendants in the context of the settlement
10 negotiations. Then there is a clear basis for
11 discovery and there may be a basis for the
12 admission of evidence that could be developed in
13 discovery.

14 So I just want the record to be clear
15 that we have never taken the position that this
16 is not a proper ground for discovery. Although,
17 some of the information may not ultimately be
18 admissible, certainly not in the context of
19 seeking admissions from the government of
20 certain points, but it may be admissible for
21 other issues, for other purposes.

22 But, if you are going to instruct him
23 not to answer, then let the record reflect that
24 I wish to follow up with questions in this area,

1 and you are not going to permit this witness to
2 answer those questions, and I will move on.

3 MR. TENENBAUM: This line of questioning as
4 I understood it pertains to the issue of whether
5 or not we at some point in this case would for
6 some, for whatever purpose, argue that the
7 defendants or ERM acted in bad faith, and/or
8 acted in bad faith.

9 What I indicated is, I think that you
10 prefaced all this by asking me whether we would
11 be willing to stipulate as to whether or not we
12 would never so allege or try to introduce this
13 into evidence.

14 I said you haven't made your defenses
15 known, and for other reasons we were not
16 prepared to do that at that time.

17 What I am now saying is that on this
18 particular tiny subpoint of whether or not the
19 allegation itself of bad faith contributed to
20 Mr. Boice's impression of bad faith, on that
21 subpoint we would be willing to stipulate that
22 we would not so contend without allowing further
23 discovery.

24 And I think that that suffices to deal

1 with that in connection with your outstanding
2 offer in this deposition on the broader subject.

3 Now, if you are suggesting that your
4 questions are not on that issue and on some
5 other issue in the case, other than the
6 impression, Mr. Boice's impression of bad faith,
7 that is entirely new.

8 And at this stage of the discovery we
9 are in day 9 or day 7 of this deposition, and we
10 have a schedule that the court has approved for
11 discovery, and that issue is not one of the
12 issues mentioned.

13 And if this is an issue that you wanted
14 to conduct discovery on, then that is something
15 that we should have discussed.

16 What I am going to do is for now I am
17 going to direct the witness not to answer that,
18 this line of questioning. And if you want to
19 discuss it further with me, I will confer with
20 you on that and see if we can work something
21 out.

22 We either will adhere to that decision,
23 or if there is going to be any discovery on it,
24 then we will have to -- if it is going to be on

1 an agreed-upon basis, then we are going to have
2 to discuss what other discovery might be.

3 The discovery period was going to be
4 ended July 29th. It has been extended for very
5 limited purposes, and this is the first time we
6 have heard that this is going to be part of the
7 limited extension of discovery.

8 MR. FINCH: Alan, I am afraid I don't
9 understand at least two-thirds of what you just
10 said, particularly the part about discovery
11 being extended for limited purposes.

12 The issue of the government's bad faith
13 has permeated this case ever since settlement
14 negotiations broke down last November and the
15 government took it upon itself to issue the 106
16 orders.

17 And your expression of surprise that we
18 would seek discovery on an issue so basic to
19 this case and your suggestion that the discovery
20 was not extended in a way that would permit us
21 to take such discovery strikes me as odd,
22 indeed. But, why don't we move on.

23 MR. TENENBAUM: I would suggest that we give
24 proper respect to the federal rules of evidence

1 on settlement discussions and move on.

2 If you want to discuss your future
3 with us, please take that up again at a future
4 date.

5 MR. FINCH: Okay.

6 C. Take a look, Mr. Boice, at the second
7 statement under comment 1 in this section of
8 Exhibit 50. The statement beginning with --
9 well, why don't I read it, so we know where we
10 are:

11 "The issuance of
12 these orders is a belated
13 attempt to cure the United
14 States' bad faith
15 negotiations during the
16 statutory mandated 120 day
17 negotiation period."

18 I won't get into questions at this
19 point about what was or was not said during the
20 negotiation period. But, let me ask you whether
21 this statement had a role to play in your
22 impression of bad faith?

23 A. All the quotes, the five quotes
24 following comment 1 all relate to the bad -- or

1 accuse the United States of bad faith in the
2 negotiations. And my response is the same as it
3 was for the previous quote.

4 Q. Which is nothing the United States did
5 was in bad faith?

6 A. That's correct.

7 Q. And therefore the assertion by the
8 defendants that the United States was at some
9 point or in some respect acting in bad faith is
10 in itself bad faith?

11 A. Since it was unfounded, yes.

12 Q. So in order for the respondents to make
13 a statement that is not in bad faith, it must be
14 a statement that is in some sense founded,
15 right?

16 A. I would think so. That is in order
17 to -- you are accusing someone of doing
18 something without any evidence.

19 Q. That means that you are accusing them
20 in bad faith?

21 A. Well, it certainly gives that
22 impression.

23 Q. Take a look at comment number 2, which
24 reads, quote:

1 Q. So the record is clear, the comment or
2 statement as to which Mr. Roice is testifying
3 reads as follows, quote:

4 "Some respondents
5 stated that the proposed
6 remedy of discharging the
7 treated groundwater to a
8 POTW or the Grand Calumet
9 River could be completed in
10 four to six years."

11 So, in your understanding that the
12 suggestion that the groundwater treatment could
13 be completed in four to six years was based on
14 the assumption that only one pore volume of
15 water would be pumped through?

16 MR. TENENBAUM: Could you read that back,
17 please?

18 (The question was read.)

19 A. I should correct that.

20 I think there was an initial submittal
21 during the negotiation period, where ERM
22 suggested or indicated that one pore volume
23 might be enough to clean up the whole thing.
24 Four to six years might have been somewhat more

1 than one pour volume.

2 Q. How much more than one pour volume?

3 A. I don't know. I would have to look at
4 it. I don't think we even received a copy of
5 the documentation backing up the statement for
6 four to six years.

7 Q. Did you ever discuss with Gov Bell or
8 anyone else at ERM your notion that the
9 procedure used by ERM to estimate the time for
10 groundwater clean up is too simplistic because,
11 to look at the language of response number 3, it
12 doesn't take adsorption onto solids in the
13 aquifer into account?

14 A. Yes.

15 I guess now that you that you have read
16 the response, I guess you are right. It was
17 apparently -- at least this four to six years is
18 based on one pour volume and not taking
19 adsorption onto solids in the aquifer into
20 account. I was thinking maybe it did. But,
21 yes, right. Okay.

22 Q. Could you read the question back to the
23 witness, please.

24 (The record was read.)

1 A. Yes. That was discussed during
2 negotiations. It was at least mentioned.

3 Q. All right.

4 I am going to ask you. even though this
5 discussion took place during the negotiations
6 period, what ERM's response was to you since we
7 are talking about a technical issue?

8 MR. TENENBAUM: I will object.

9 But, subject to my objections on this
10 very limited area, since I am not waiving
11 anything, but if you want to waive, it is your
12 statement made by your contractor.

13 So, go ahead.

14 MR. FINCH: I am not waiving anything
15 either. I am just asking the question.

16 MR. TENENBAUM: I think you are, but go
17 ahead.

18 A. All I can remember is when that -- I am
19 not sure it was ERM that brought it up, but one
20 of the negotiators for the PRP's brought it up.
21 And I made that statement. Then they just shut
22 up as far as I can remember.

23 BY MR. FINCH:

24 Q. They just shut up?

1 A. That's right.

2 Q. What do you mean by that?

3 A. They didn't mention it any more.

4 Q. In other words, you made this comment
5 that this procedure was too simplistic and that
6 you didn't receive a response to that comment?

7 A. That's correct.

8 Q. And they ceased to mention the subject
9 any more?

10 A. That's right.

11 Q. From which you conclude that they were
12 chastised by your comment?

13 A. I don't know.

14 Q. Or instructed by your comment?

15 A. I don't know.

16 Q. Made to see the light by your comment?

17 A. I don't know.

18 Q. Take a look at comment number 4, which
19 reads as follows, quote:

20 "Some respondents
21 stated that the United
22 States refused to agree to
23 follow the MSC to
24 investigate a discharge to a

1 POTW or to the Grand Calumet
2 River."

3 Does that statement have any role to
4 play in your impression of bad faith?

5 A. Yes, I think it would.

6 Q. How so?

7 A. Well, it says that as it states in our
8 response:

9 "The Midco Steering
10 Committee has been free to
11 investigate these options
12 throughout the period of
13 completion of the remedial
14 investigation feasibility
15 study. In the records of
16 decision dated June 30,
17 1989, the USEPA made its
18 decision regarding what
19 remedial action should be
20 taken at the Midco sites.
21 The additional information
22 gained during the
23 negotiation period further
24 confirmed that a discharge

1 to a POTW or to the Grand
2 Calumet River. That our said
3 treatment would be
4 unacceptable."

5 Q. You just read the response or a
6 significant portion of the written response in
7 the record.

8 A. That's correct.

9 Q. But that doesn't tell me why you form
10 an impression of bad faith as a result of the
11 comment. It just tell us me why you disagreed
12 with the comment.

13 A. It is because the comment doesn't
14 appear to be honest. It says --

15 Q. Doesn't appear to be honest?

16 A. It says the United States refused to
17 agree to allow the Midco Steering Committee to
18 investigate that, but we did allow you to
19 investigate it.

20 Q. What do you mean by the word
21 investigate?

22 A. Well, that is what it says. I don't know.

23 Q. Well, investigate --

24 A. Investigate. That means look into the

1 possibility of discharge to the POTW or the
2 Grand Calumet River.

3 Q. So if I understand you correctly, the
4 United States permitted the Midco Steering
5 Committee to apply for a permit to discharge
6 a POTW or to the Grand Calumet River?

7 MR. TENENBAUM: Apply or investigate?

8 MR. FINCH: I am trying to use this witness'
9 understanding of the word investigate.

10 Let me back up, perhaps.

11 Q. Is application for a permit to discharge
12 whether such a discharge would be permitted or
13 allowed part of the investigatory process as you
14 understand it?

15 A. It could be.

16 Q. Was it here?

17 A. As far as I know, the Midco Steering
18 Committee didn't apply for a discharge.

19 Q. Do you know whether the United States
20 took a position on whether such an application
21 would be sanctioned?

22 A. You mean whether it would be approved?

23 Q. Not whether it would be approved.

24 Whether such an application, the application

1 itself, could be made by the Hidco Steering
2 Committee?

3 A. I think we indicated in negotiations
4 that you could apply for a permit.

5 MR. KEATING: Do you want to ask me
6 indicated that?

7 MR. FINCH: Thank you, Jim.

8 A. I think that is an attorney.

9 BY MR. FINCH:

10 Q. I haven't asked the question yet.

11 When you say we indicated that the CSC
12 could apply for a permit, who is we?

13 MR. TENENBAUM: Since the witness was for
14 the first time indicated that this came up in
15 particular discussions with -- settlement
16 discussions which involved an attorney, I am a
17 little bit reluctant.

18 MR. KEATING: But there is nothing hidden,
19 if an attorney says something to somebody else,
20 the other side, there is no privilege.

21 MR. TENENBAUM: I am talking about
22 settlement.

23 MR. KEATING: But he is saying this is bad
24 faith because they did allow an application or

1 did allow the committee to go to apply for a
2 permit, and their attorney told them. What
3 attorney, when, how, who?

4 MR. TENENBAUM: If everybody present will
5 agree that we are not waiving any settlement
6 privilege under the Federal rules of evidence.

7 MR. FINCH: It is my deposition and I am
8 saying you are waiving nothing by responding to
9 the question.

10 MR. TENENBAUM: That we are not waiving
11 anything?

12 MR. FINCH: You are not waiving anything by
13 responding to the question.

14 MR. TENENBAUM: Anyone in the room who
15 disagrees with that?

16 MR. KEATING: I don't even know what you
17 could waive.

18 MR. TENENBAUM: Then subject to my
19 objection, I will let you answer that question.

20 BY MR. FINCH:

21 Q. You say an attorney indicated that an
22 application could be made?

23 A. Well, during negotiations, it came to a
24 point where the only issue was the POTW

1 discharge.

2 He indicated that he would allow --
3 that is, the negotiation team that included me,
4 Mike Berman and Joel Gross, that he would allow
5 the Midco Steering Committee or the Midco
6 representatives to --

7 MR. TENENBAUM: I hate to interrupt you.
8 But, the question focuses on what was said to
9 the other, to FRM or whoever was present at the
10 meeting.

11 So if you could limit your answer, I
12 don't want to waive anything.

13 MR. FINCH: I think he was.

14 MR. TENENBAUM: He was giving some preface
15 relating to the negotiation time, which might
16 involve attorney-client discussions and work
17 product.

18 BY MR. FINCH:

19 Q. Let me be clear.

20 I am only asking, Mr. Boice, about
21 communications with the Midco Steering Committee
22 or its representatives, and not with internal
23 communications that the government may have had
24 outside of the presence or not directed to the

1 Midco Steering Committee or its representatives.

2 A. Can I ask you a question?

3 Q. Sure.

4 A. Could we prevent you from applying for
5 a permit for a water discharge?

6 Q. You have to ask an environmental lawyer
7 that.

8 A. As far as I know, there is no way the
9 Agency could say you can't apply for a permit.
10 It is a free country.

11 We did indicate that following a
12 settlement we could -- the Midco representatives
13 could pursue or investigate this POTW discharge
14 issue.

15 Q. And that the United States had no
16 position to take as to whether a permit would,
17 in fact, be granted until such time as a permit
18 is made; is that what was communicated by the
19 United States to the Midco Steering Committee?

20 A. Well, this isn't the question. The
21 question is on --

22 Q. No. That's the question I just asked
23 you, so please answer it.

24 MR. TENENBAUM: That is a new question.

1 A. The comment of some respondents stated
2 the US refused to agree to allow the Vicks
3 Steering Committee to investigate a discharge to
4 a POTW or to the Grand Calumet River.

5 You are bringing up a different issue
6 now. I think we clearly indicated we did not
7 refuse to allow you that. And to my impression
8 of the performance or the bad faith issue is
9 based on they are saying something that
10 basically is not correct or not honest.

11 MR. FINCH: Could you read the last question
12 back to the witness, please.

13 (The record was read.)

14 Q. That is a yes or no question, Mr.
15 Boice.

16 A. As I said before, it is irrelevant to
17 the issue we are discussing. But, we didn't --
18 as you know, we didn't indicate that.

19 Q. What did you indicate?

20 A. As you know, since we have selected
21 deep well injection into the Calumet aquifer in
22 the ROD, the alternative of a discharge to the
23 POTW or to the Grand Calumet River was
24 eliminated.

1 Q. It was eliminated by?

2 A. By EPA.

3 Q. In the ROD?

4 A. In the record of decision.

5 Q. And you did not deviate from that
6 position at all, did you, during the negotiation
7 period?

8 MR. TENENBAUM: Which negotiation period?

9 MR. FINCH: Following the issuance of the
10 ROD.

11 A. That is a different -- we are talking
12 about something else again.

13 MR. TENENBAUM: Now we are into -- we have
14 gone beyond bad faith.

15 A. We have gone into comment number 4.

16 MR. FINCH: I think it is directly related
17 to this whole question of this witness'
18 impression of bad faith on this point.

19 MR. TENENBAUM: I don't see how it is.

20 Where was this comment 4?

21 A. This is relating to --

22 MR. TENENBAUM: It says that --

23 MR. FINCH: It is very difficult for the
24 reporter the to take down two sets of comments

1 at the same time.

2 A. We know.

3 MR. TENENBAUM: Yes.

4 The comment states that the respondent
5 stated that the United States refused to agree
6 to allow the Steering Committee to investigate
7 the discharge to a POTW of the Grand Calumet
8 River.

9 The witness has clearly indicated two
10 or three times why he thought that was in bad
11 faith. I think he has adequately answered that.

12 I have allowed you some ground to
13 follow up with your different interpretation of
14 these comments. But, I think we have exhausted
15 it.

16 MR. FINCH: All right. Let's just have a
17 clear record on this, Alan.

18 I would like the question read back to
19 the witness, and if you wish to issue an
20 instruction not to answer, please do so, so the
21 record is clear as to your cutting off further
22 questioning on this point.

23

24

1 (The question was read as follows:

2 "O. And you did
3 not deviate from that
4 position at all, did you,
5 during the negotiation
6 period?)"

7 MR. TENENBAUM: This is a question that
8 seeks to violate the federal rules of evidence
9 regarding settlement negotiations and, in
10 addition, it has gone beyond the foundation, if
11 any, established for questioning on the issue of
12 the impression of bad faith.

13 And also seeks to take discovery on --
14 it may, basically take discovery, I would have
15 to analyze it further, on record-review issues
16 as well.

17 For all these reasons, given that there
18 is no foundation established for this point at
19 this point of questioning on the impression of
20 bad faith, I am going to have to instruct the
21 witness not to answer.

22 The witness has clearly answered two or
23 three times as to why this contributed to an
24 impression that he had of bad faith.

1 MR. FINCH: All right.

2 Can we take a very brief break. Like
3 maybe just a couple minutes. Thank you.

4 (Whereupon a short recess was taken.)

5 Back on the record, please.

6 Mr. Keating has suggested a short line
7 of follow up on a question that was answered
8 immediately or shortly before the break.

9 Q. You testified, Mr. Boice, that an
10 attorney communicated to the Video Steering
11 Committee the United States' position on the
12 filing of a permit to discharge to a POW.

13 Could you identify who that attorney
14 was for the record?

15 MR. TENENBAUM: Subject to my continuing
16 objections on this point.

17 A. Okay.

18 Well, first I should clarify that we
19 indicated that you could continue to investigate
20 that possibility and, of course, that could have
21 included your applying for a permit. And the
22 attorney was Joel Gross.

23 BY MR. FINCH:

24 Q. Who was present at the time this

1 communication was made?

2 A. From your side you mean or from our
3 side?

4 Q. Everyone you can remember who was
5 present when the communication was made from
6 your side.

7 MR. TENENBAUM: Same continuing objection.

8 A. I was there, Mike Berman, Joel Gross,
9 Tim Harker, Roy Ball, Arthur Schlessinger, I am
10 pretty sure Jeff Fort was there. I am not sure
11 about the others.

12 Q. All right.

13 Please take a look at comment number 5
14 among the comments to which your testimony was
15 directed shortly before the break.

16 Does that comment have a role to play
17 in your impression of bad faith?

18 A. Yes.

19 Q. Okay.

20 So the record is clear, I will read the
21 comment into the record. Quote:

22 "Some respondents

23 indicated that the United

24 States is refusing to

1 consider allowing actions at
2 the Midco sites that are
3 being allowed at the Ninth
4 Avenue dump site. They also
5 indicate that the
6 requirements of the
7 selective remedy for the
8 Midco sites are inconsistent
9 with the remedy for Ninth
10 Avenue dump site."

11 Could you tell me how this statement
12 has a role to play in your impression of bad
13 faith?

14 A. Yes.

15 My impression of the statement is that
16 these statements that were included in the
17 comments from the -- some of the people
18 representing Midco generators is dishonest
19 because, for one thing, if you make a statement
20 or an accusation, you should provide some
21 information to back that up.

22 These defendants didn't provide any
23 documentation backing up this accusation. They
24 just threw it out and they did that for a number

1 of issues.

2 In addition, the statement is correct
3 and that is addressed in our response to comment
4 number 5.

5 I would also like to emphasize that
6 during our meeting on December 7th, Tim Harker
7 indicated that reinjection of saline water for
8 the shallow aquifer outside the slurry wall has
9 been approved at the Ninth Avenue dump site.

10 I checked this out with the remedial
11 project manager afterwards and she said it was
12 not true.

13 Q. There was a meeting that occurred on
14 December 7, 1989?

15 A. That's correct.

16 Q. And Tim Harker attended this meeting?

17 A. Yes.

18 Q. Who else attended this meeting?

19 MR. TENENBAUM: That was the --

20 A. That was the meeting on the unilateral
21 administrative order to discuss comments on the
22 unilateral administrative order.

23 BY MR. FINCH:

24 Q. All right.

1 This was a meeting that took place at
2 111 West Jackson Boulevard in Chicago?

3 A. I believe it was. Yes, that's right.

4 Q. Okay.

5 This was the meeting at which
6 respondents to the 106 order were present at
7 EPA's offices; is that right?

8 A. Yes.

9 Q. And is it your testimony now that Tim
10 Harker said that reinjection of saline water
11 into the shallow aquifer had been approved at
12 the Ninth Avenue dump site?

13 A. Yes. As specifically stated in the
14 response to comment number 5.

15 Q. Okay.

16 And then you say that later you checked
17 this out with somebody else at your Agency and
18 found out that this was not true, is that your
19 testimony?

20 A. That's correct.

21 Q. Who did you check it out with?

22 A. Allison Wilner.

23 Q. Who?

24 A. Allison Wilner. A-l-l-i-s-o-n

1 Hiltner, H-i-l-t-n-e-r.

2 Q. Isn't it true that Melinda Gould was
3 present at the December 7, 1989 meeting?

4 A. I don't remember.

5 Q. Isn't it true that Melinda Gould has
6 had a role to play for the Ninth Avenue dump
7 site?

8 A. No. She is not the supervisor.

9 Q. He has no role to play at that site?

10 A. No significant role, no.

11 Q. Has she had an insignificant role to
12 play at that site?

13 MR. TENENBAUM: You just want to know
14 whatever he knows?

15 MR. FINCH: Just what you know.

16 A. She is the supervisor for one of the
17 units in the Illinois-Indiana section for the
18 Superfund and -- but the Ninth Avenue dump site
19 is in another unit. Allison's supervisor is
20 Kerry Street.

21 Q. Isn't it true that Melinda Gould would
22 have had knowledge at the time of that meeting
23 of what remedies were or were not approved for
24 the Ninth Avenue dump site?

1 A. Not necessarily.

2 Q. So as far as you know, she could not
3 have had that knowledge?

4 MR. TENENBAUM: Asked and answered.

5 Do you have anything further to add?

6 A. I have nothing further to add.

7 BY MR. FINCH:

8 Q. Is that a yes or a no?

9 A. Basically, the Ninth Avenue jump 200
10 had been approved. And as it explains in this
11 response number 5, which I can read to you if
12 you want me to.

13 Q. No, please don't read to me.

14 A. It is fully explained in response
15 number 5.

16 Q. You said that your impression of bad
17 faith regarding the comment or the contents of
18 comment number 5 came from your belief that it
19 is a dishonest comment, is that right, is that
20 the word you used?

21 A. Yes.

22 Q. And it is dishonest because, I want to
23 know exactly what, dishonest because of the
24 statements allegedly made by Mr. Barker; is that

1 right?

2 A. By him, and also I think the
3 information was available to the respondents to
4 indicate that that was not true at the time.
5 And they provided no background or information
6 to indicate it was true.

7 Q. What was true?

8 A. That their statements here were true.
9 That they didn't back up their statements.

10 Q. Which statement in particular?

11 A. The comments in 5. That the US is
12 refusing to consider allowing actions at the
13 Midco sites that are being allowed at the Ninth
14 Avenue dump site.

15 Q. Is it your understanding that there is
16 nothing being allowed at the Ninth Avenue dump
17 site that is not also being allowed at the Midco
18 sites?

19 A. What did you say?

20 Q. Is it your understanding that there is
21 nothing being allowed at the Ninth Avenue dump
22 site that is not also being allowed at the Midco
23 sites?

24 Is that your present understanding?

1 MR. TENENBAUM: Objection, no foundation,
2 and vague and overbroad, compound.

3 A. Could you clarify that?

4 BY MR. FINCH:

5 Q. All right.

6 Do you have any knowledge or
7 impression, for that matter, of what remedies
8 are being allowed at this stage at the Ninth
9 Avenue dump site?

10 A. You mean the selected remedy in EPA's
11 record of decision?

12 Q. I mean whatever remedies are being
13 allowed by EPA at the site. Whether they are
14 contained in the record of decision or
15 otherwise, I don't care.

16 MR. TENENBAUM: Same continuing objection.
17 It seeks discovery into remedy selection, now at
18 a different site.

19 MR. FINCH: No. All I want to do is know
20 why this witness believes that the comments
21 contained in comment number 5 are dishonest.

22 It had to have proceeded from some
23 understanding in this witness' mind about what
24 remedies were being allowed at the Ninth Avenue

1 dump site. So, I want to know what that
2 understanding is.

3 MR. TENENBAUM: I think he has already
4 testified about it. But, if you want him to do
5 it again, try again.

6 MR. FINCH: All right.

7 MR. TENENBAUM: Subject to my objections.

8 A. So the question is, what is the
9 question?

10 MR. FINCH: Read the question back to the
11 witness, please.

12 Q. To expedite things, let me withdraw
13 whatever the last unanswered question was and
14 restate it.

15 Do you know what remedies are being
16 allowed at the Ninth Avenue dump site, Mr.
17 Boice?

18 A. I know the selected remedy in the
19 record of decision, yes.

20 Q. Do you know whether the selected remedy
21 in the record of decision has been in any sense
22 departed from by EPA at this stage?

23 A. No.

24 Q. You don't know?

1 A. As far as I know, it hasn't been
2 departed from. It is still in effect. There
3 hasn't been any amendment to the record of
4 decision.

5 Q. All right.

6 Are there any remedies that are allowed
7 under the selected remedy or record of decision
8 for the Ninth Avenue dump site that are not also
9 allowed at the Midco I or Midco II sites?

10 MR. TENENBAUM: Objection, compound, vague.

11 You can try and answer.

12 A. My understanding is that basically
13 anything they are allowed to do at the Ninth
14 Avenue dump site, they would be allowed to do at
15 the Midco site, other than we have somewhat
16 different cleanup action levels.

17 BY MR. FINCH:

18 Q. I am not talking about the cleanup
19 action level. I am talking about remedial
20 components.

21 MR. TENENBAUM: Wait a second.

22 What do you mean, are you saying that
23 remedial components are not related to cleanup
24 action levels?

1 MR. FINCH: All right. I think you have
2 made a good point. Let me withdraw my comment
3 with apologies, and put it in the form of a
4 question.

5 Q. So what you are saying, Mr. Boice, is
6 that other than cleanup action levels, there
7 isn't anything that is permitted by way of
8 remedial action at the Ninth Avenue site that is
9 not also permitted by way of remedial action at
10 the Midco I and Midco II sites?

11 MR. TENENBAUM: Well it, I will have to
12 object to that. That is an internally
13 inconsistent question.

14 You say other than cleanup action
15 levels. That presumes that cleanup action
16 levels are not related to remedial action of the
17 two sites. So I think I will have to object to
18 this as vague and ambiguous.

19 MR. FINCH: I really want to understand the
20 witness' answer. I think it is important.

21 MR. TENENBAUM: Furthermore, there is no
22 foundation for this question, because the
23 witness is giving limited testimony on his
24 impression of bad faith. And that is

1 adequately -- he has already adequately
2 explained that. Plus it is explained in the
3 response.

4 But, if you want a definitive
5 comparison of the ROD's for these two sides,
6 don't think that is a proper question.

7 MR. FINCH: I don't want --

8 MR. TENENBAUM: There is no foundation for
9 that.

10 MR. FINCH: I don't want one.

11 I just wanted to know what this witness
12 understands, so that I can understand why he
13 thinks there was dishonesty in comment number 5.

14 MR. TENENBAUM: I think he has already
15 stated three or four times. But, if you want
16 him to try again.

17 MR. BERMAN: We are beyond the scope of
18 comment 5.

19 MR. TENENBAUM: He has already stated three
20 or four times as to what it was in this
21 comparison between Ninth Avenue and Midco, as
22 relates to the comment made that contributed to
23 his impression of bad faith.

24 Now you are well beyond that.

1 BY MR. FINCH:

2 Q. So, Mr. Boice, to your understanding,
3 setting aside for the moment the question of
4 action level, the remedies available at the
5 Ninth Avenue site are no different than the --
6 there is nothing available at the Ninth Avenue
7 site that is not also available as a remedy at
8 the Midco sites?

9 MR. TENENBAUM: Objection, vague, ambiguous,
10 compound, no way to compare apples and oranges
11 in the abstract, different sites.

12 But if you can answer, you can try.

13 A. The issue at hand is whether a
14 discharge of the highly saline water was allowed
15 at the Ninth Avenue dump site and not allowed at
16 the Midco sites.

17 And the answer is that that is
18 incorrect. And it is fully addressed in
19 response number 5, which I can summarize if you
20 want me to.

21 Q. No.

22 If you are saying it is fully addressed
23 in response number 5, I will just allow you to
24 rely on that response.

1 Take a look at comment number 6 which
2 reads, quote:

3 "A couple of
4 respondents stated that the
5 Midco sites have not been
6 fully characterized."

7 Does that statement have any role to
8 play in your impression of bad faith?

9 A. Yes.

10 Q. How so?

11 A. Well, again I think it is a dishonest
12 statement.

13 As summarized in response number 5:

14 "These sites have
15 been under study for years.
16 The RI/FSS were conducted by
17 contractors working for the
18 Midco Steering Committee."

19 So if there was something overlooked,
20 it is their responsibility.

21 "This included
22 installation of 10
23 monitoring wells at Midco
24 II, 32 monitoring wells at

1 Midco I, and collection of
2 over 100 samples at each
3 site, which are only 4 and 7
4 acres in area. During this
5 period of time the Midco
6 Steering Committee had the
7 opportunity to evaluate any
8 options it wished to
9 evaluate."

10 Q. What is your understanding of the word
11 characterize?

12 A. Characterize is used in a number of
13 Agency guidance documents. It means to sample
14 the sites, to determine the extent of
15 contamination, sufficient to evaluate
16 alternatives for the remedial action, and to
17 evaluate the risks at the site.

18 Q. Characterization has nothing to do with
19 treatability?

20 A. No.

21 Generally the treatability study would
22 be to evaluate one particular alternative. Site
23 characterization has to do with information
24 about the site itself.

1 Q. So you are absolutely certain that none
2 of the respondents could have maintained in good
3 faith that the Midco sites have not been fully
4 characterized?

5 A. Well, if you want to get out the
6 comments yourself, then read it in the context
7 of it.

8 But, my impression is that they are
9 talking about -- and my impression when they
10 were -- when I read the comments was that they
11 were talking about the site characterization.

12 Q. They weren't talking about something
13 other than site characterization as you now
14 define it?

15 A. That's correct.

16 Q. Take a look at comment number 7 which
17 reads, quote:

18 **"The United States**
19 **is using the unilateral**
20 **administrative orders to**
21 **require elimination of the**
22 **salt contamination."**

23 Does that statement have any role to
24 play in your impression of bad faith?

1 A. Yes.

2 Q. How so?

3 A. Well, again, in my opinion it is a
4 dishonest statement. And it explains in
5 response number 7 that, here it says the UAOs
6 require elimination of salt contamination, yes.

7 The ROD's themselves, as well as the
8 UAOs, make it clear that clean up criteria are
9 for addressing hazardous substances and not the
10 salt

11 "The US is not
12 requiring those respondents
13 to address an entire salt
14 plume originating from
15 another facility. However,
16 EPA is requiring that salt
17 contaminated groundwater,
18 that is removed incidental
19 to the remedial actions that
20 are necessary to address
21 risks due to the hazardous
22 substances, must be handled
23 and disposed of in an
24 environmentally and legally

1 acceptable manner."

2 Q. All right.

3 So the record is clear, you just read
4 into the record virtually verbatim the formal
5 response to comment number 7?

6 A. That's correct.

7 Q. But that doesn't explain to me why the
8 comment is dishonest?

9 A. Well, okay.

10 First of all, you see it says we are
11 using the DAOs to require elimination of the
12 salt contamination. And yet the ROD's
13 themselves make it clear that we are not
14 requiring elimination of the salt contamination.

15 So even the major EPA decision document
16 documents that we are not eliminating -- at
17 least the purpose of the remedial action is not
18 to eliminate the salt contamination.

19 Q. Do you see any possibility that there
20 could be a good faith disagreement at least on
21 the part of the Midco respondents over whether
22 EPA's requirement that the salt not be
23 discharged to a POTW is fair in terms of the
24 ROD?

1 MR. TENENBAUM: Wait a second.

2 What does that have to do with this?

3 A. This has nothing to do with the
4 question, with comment 6.

5 BY MR. FINCH:

6 Q. We are talking about comment 7.

7 A. Comment 7. Right.

8 Q. I think it has everything to do with
9 it.

10 You are saying that comment number 7,
11 which may or may not be a fair summary of the
12 statements made by the respondents that are
13 cited in the comment, but you are saying that
14 the comment is dishonest. And I am asking
15 you --

16 A. No. I said that to me it appears
17 dishonest.

18 Q. Okay.

19 You are saying it appears dishonest. I
20 really don't understand that response, Mr. ~~Boice~~
21 Boice, and I am going to ask you questions until
22 I understand what it is that you are saying.

23 MR. TENENBAUM: I think it is very clear.

24 He has already said the statement says

1 that it requires elimination of salt. US is
2 using the HAOs to require the elimination of
3 salt.

4 And he saying that the HAOs don't
5 require the elimination of salt. So, JBY is
6 that not clear?

7 BY MR. FINCH:

8 Q. So that there is nothing in the
9 unilateral administrative orders that would
10 require the respondents to do something with
11 salt-contaminated water, it could just let the
12 salt remain in the ground; is that correct?

13 A. Read comment 7.

14 It says the US is using the HAOs to
15 require the elimination of the salt
16 contamination.

17 The ROD's clearly indicate that the
18 cleanup action levels are not for the salt
19 contamination, they are for the hazardous
20 substances.

21 And all we are asking, requiring is
22 that the salt removed incidental to the remedial
23 actions be properly -- be disposed of in an
24 environmentally and legally acceptable manner.

1 O. If the salt came out of the ground at
2 the Midco sites, why can't just the salt be left
3 in the ground at the Midco sites?

4 MR. TENENBAUM: Object. That calls for a
5 legal conclusion and discovery on remedy
6 selection.

7 And it is beyond the purview of the
8 issue of his impression of bad faith with
9 respect to comment 7.

10 MR. FINCH: I am thoroughly confused.

11 Could you put the question back to the
12 witness, please.

13 (The record was read.)

14 MR. TENENBAUM: What does that have to do
15 with elimination of the salt?

16 MR. FINCH: That's my question.

17 We have testimony from this witness
18 that he has an impression of dishonesty in the
19 assertion that the Section 106 orders require
20 elimination of salt contamination.

21 And I am just trying to explore why it
22 is that this witness does not believe that the
23 106 orders require elimination of salt
24 contamination.

1 MR. TENENBAUM: He has testified to that
2 three or four times.

3 MR. FINCH: I haven't understood his
4 comments. You have to forgive me, Alan. I am
5 not an environmental lawyer. I know nothing
6 about this area of law.

7 I am trying to understand why this
8 witness is testifying as he is. And I am
9 entitled to that. I am entitled to a clear
10 understanding of this witness' statements on the
11 record.

12 MR. TENENBAUM: He has already given you a
13 clear understanding. You are trying to depart,
14 use this as a pretext for taking discovery on
15 remedy selection.

16 MR. FINCH: No.

17 I am trying to use this to understand
18 what this witness has testified to.

19 (Discussion had off the record.)

20 Back on the record, please.

21 O. Mr. Boice, I am not trying to argue
22 with you. I am not trying to elicit any
23 information relating to remedial action
24 selection. I am not asking you to explain or

1 justify or illuminate any action by EPA in this
2 case.

3 What I want to understand, though, is
4 why you think the conclusion that the government
5 is using the 106 orders to require elimination
6 of salt contamination can in any sense be
7 dishonest?

8 Is there an option available to the
9 respondents to take the water out of the Midco
10 sites and leave the salt in the Midco sites
11 where it was before they took the water out of
12 the Midco sites?

13 A. If you take time to read the record of
14 decision, you will see that one of the options
15 for addressing the groundwater is to pump it
16 out, treat it, and reinject it back into the
17 aquifer in a manner that will not spread the
18 plume.

19 So that is an option available to the
20 Midco representatives.

21 Q. What happens to the salt?

22 A. The salt would sit there in the same
23 place it came out of, but the hazardous
24 substances would have to be removed.

1 Q. So your assumption is that the remedial
2 action alternative favored by respondents would
3 in fact expand the salt plume?

4 A. That doesn't have anything to do with
5 comment 7.

6 Q. But it has something to do with the
7 statement you just made?

8 A. You are getting away from comment 7.
9 If you want to --

10 Q. No, I don't think I am.

11 MR. TENENBAUM: I don't even know which
12 alternative favored by the respondents you are
13 talking about.

14 MR. FINCH: Any alternative. Discharge to
15 POTW.

16 MR. TENENBAUM: That has nothing to do with
17 what he said, though.

18 MR. FINCH: I don't understand why it is
19 necessary to remove salt from water that is
20 discharged to a POTW.

21 A. This doesn't have anything to do with
22 comment 7.

23 MR. TENENBAUM: He is saying whatever the
24 answer to your question about the POTW is, this

1 is wrong, regardless of whatever the answers are
2 to your question.

3 MR. FINCH: All right.

4 MR. KARAGANTIS: Just so we don't pass this
5 on the record.

6 Comment 7 has a lot to do with
7 discharge to the POTW's. Because, the ROD and
8 the UAO require the removal of salt as opposed
9 to discharging into the POTW's. That's what
10 comment 7 is all about.

11 MR. FINCH: Right. That's my point.

12 But, I will concede that we have run
13 into a brick wall and we are not going to get
14 anything more from this witness on this
15 particular subject.

16 Q. Take a look at comment number 8 which
17 reads as follows:

18 "The United States
19 selected a remedy without
20 conducting adequate
21 treatability studies.
22 Treatability studies are
23 required to be part of the
24 feasibility study process."

Is there anything in that comment which has a role to play in your impression of his faith?

A. No.

Q. All right.

Take a look at comment number 2, which reads as follows:

"The EPA failed to include in the record or decision administrative record the central set of comments submitted by the Midco Steering Committee on the proposed remedy."

Does that statement have any role to play in your impression of bad faith?

A. No.

Q. Take a look at comment 10 which reads as follows, quote:

"During the conference on the unilateral administrative order, on December 7, 1989, EPA made it clear that it has already

1 made up its mind to insist
2 on compliance with the
3 unilateral administrative
4 orders without considering
5 the comments of any
6 respondent."

7 Does that statement have any role to
8 play in your impression of bad faith?

9 A. Yes.

10 Q. Okay.

11 How so?

12 A. Well, to me it appears to be a
13 dishonest statement in that we, as it states in
14 response number 10, it was stated several times
15 in that meeting by EPA, that the Agency would
16 review the comments from the respondents and
17 take them into consideration before the UAOs
18 become effective.

19 And:

20 **"In fact, due to**
21 the number of comments EPA
22 extended the effective date
23 of the UAOs to allow time to
24 review the comments. In

1 addition, in response to the
2 comments, some headlines in
3 the UAOs have been revised."

4 Q. All right.

5 So you have just read out loud the
6 first paragraph of the formal response to
7 comment 10, isn't that correct?

8 A. That's correct.

9 Q. Why does that show dishonesty?

10 A. Well, as I stated before, comment 10
11 indicates that we made it clear that we would
12 insist on compliance with the UAOs without
13 considering the comments from the respondents.

14 In fact, our actions as well as our --
15 what we said at the December 7, 1989 meeting
16 indicates that we did and would evaluate the
17 respondents' comments and take them into account
18 prior to the effective date of the unilateral
19 orders.

20 Q. What do you mean take them into
21 account?

22 A. Take them into consideration, read
23 them, evaluate them, determine whether there is
24 any merit in the comments.

1 Q. What if there were merit in the
2 comments?

3 A. Then we may revise the unilateral order
4 as we did to revise certain deadlines.

5 Q. Do you recall when the administrative
6 orders became effective?

7 A. December 29, 1989.

8 Q. Do you recall when you received
9 comments from the respondents?

10 A. It would have been early in December.

11 Q. How early?

12 A. I don't remember. I would have to look
13 at the dates.

14 Q. Were there, in fact, proceedings
15 conducted by EPA to consider these comments?

16 MR. TENENBAUM: Just a second. This is
17 beyond the impression of bad faith issue, I
18 think.

19 MR. FINCH: I don't think so, Alan.

20 We just had this witness read from the
21 formal response, embracing the response as his
22 own testimony, and in so doing testified that
23 the Agency took comments into effect before the
24 administrative orders became effective.

1 Now I am asking --

2 MR. TENENBAUM: Took comments into account,
3 into account you mean?

4 MR. PINCH: Into account before the
5 administrative orders became effective.

6 Now I am asking him how they were taken
7 into account.

8 Were there any meetings. Were there
9 actual proceedings. Did somebody from EPA
10 actually look at the comments and evaluate them
11 as this witness testified the Agency did.

12 Now you are saying I can't ask him
13 that.

14 MR. TENENBAUM: You have to understand here
15 that subject to my objections, I have allowed
16 you some leeway to question on the impression of
17 bad faith.

18 He has explained that, as to why this
19 gave him an impression of bad faith. But, we
20 also have here that we are talking about the
21 Agency's submission of the responsiveness
22 summary, and you are now wanting to probe the
23 process that led to the creation of that
24 document.

1 MR. FINCH: I don't want to know about the
2 process.

3 MR. TENENBAUM: You just asked him about
4 what was the process to respond to the comments.
5 That is a core Agency decision-making process.

6 MR. FINCH: I don't want to know about the
7 process.

8 MR. TENENBAUM: That was your question.

9 You can say as many times you don't
10 want to know about it, but that is what your
11 question was.

12 MR. FINCH: Okay.

13 Let me rephrase the question, solely in
14 terms of this witness' understanding and state
15 of mind.

16 Q. Is it your understanding, then, was it
17 your state of mind at the point that you
18 concluded that comment number 10 was part of
19 your impression of bad faith that, in fact, EPA
20 took into consideration and account comments
21 made by the respondents to the administrative
22 orders?

23 A. Yes.

24 Q. And why did you have that impression?

1 A. Well, I think I just explained it to
2 you.

3 As this states in comment 10, the "disco"
4 respondents in the conference, or the -- during
5 the conference, the "disco" respondents in their
6 comments to EPA's unilateral administrative
7 orders stated that on the December 7, 1989
8 meeting, EPA made it clear that it had already
9 made up its mind to insist on compliance with
10 the HAOs without considering comments of any
11 respondent.

12 First of all, during that meeting EPA
13 made it clear that the Agency would review the
14 comments from the respondents and take them into
15 consideration before the HAOs became effective.

16 Q. Okay.

17 So that is what EPA told the
18 respondents on December 7, 1989, right?

19 A. That's correct.

20 And it directly contradicts what the
21 respondents said we said.

22 Q. Okay. Again, I want to understand
23 this.

24 That is what EPA told the respondents

1 on December 7, 1989, right?

2 A. That's correct. And, in fact, our
3 actions indicated that we did consider these
4 comments.

5 Q. Then you subsequently did consider
6 these comments, is that what you are saying?

7 MR. TENENBAUM: The Agency did.

8 MR. FINCH: The Agency.

9 A. That's correct.

10 Q. And you personally, did you consider
11 the comments?

12 MR. TENENBAUM: Same continuing objection.

13 BY MR. FINCH:

14 Q. Did you?

15 A. Yes.

16 Q. And you hadn't made up your mind about
17 the administrative orders until you considered
18 the comments, that is your testimony?

19 MR. TENENBAUM: Same continuing objection.

20 A. Well, we would take the comments into
21 account and would consider the comments before
22 we made the unilateral administrative orders
23 effective.

24 MR. FINCH: Could you read the last question

1 back to the witness.

2 (The record was read.)

3 MR. TENENBAUM: It was asked and answered.

4 MR. FINCH: He didn't answer it. He said
5 a --

6 A. As I stated before, we considered the
7 comments from the respondents prior to the
8 effective date of the unilateral administrative
9 orders.

10 And, in fact, we revised some of the
11 deadlines and we prepared this Exhibit 60, which
12 is about -- must be about 40 pages long, at
13 least, in response to your comments. To make
14 sure that -- you know, that we did actually
15 respond to all your comments.

16 In fact, that is what we are going over
17 now, is our response to each of your comments,
18 which is a very lengthy process.

19 MR. TENENBAUM: Doesn't this exhibit answer
20 your question partially?

21 MR. FINCH: I think there is no question
22 that the United States has come up with a
23 response to the majority of the comments that
24 were noted by the respondents. But, my question

1 doesn't go to the government's ability to
2 justify itself.

3 My question goes to whether the
4 government held in suspense its final point of
5 view on the propriety of the ROD remedy in terms
6 of the Section 106 orders until the comments
7 were made.

8 And I am having great difficulty
9 getting this witness to tell me his
10 understanding of that.

11 MR. TENENBAUM: I think he has told you
12 three or four times very clearly what the answer
13 to that was.

14 If you want him to answer a fifth time,
15 he will try.

16 MR. FINCH: He has told me the effective
17 date of the ROD's were deferred pending
18 receipt --

19 A. No. The unilateral administrative
20 orders.

21 Q. Excuse me.

22 -- the administrative order was
23 deferred pending receipt of --

24 A. No, pending --

1 Q. -- and consideration of the comments?

2 A. Right.

3 Q. And I know that is true.

4 But, the effective date of the
5 administrative orders is just a legal fiction
6 of sorts.

7 I want to know whether this witness
8 made up his mind about the propriety of ROD
9 remedies before he got the comments. That is a
10 different answer.

11 A. That is a different question. Now you
12 changed the question from the unilateral orders
13 to the ROD's.

14 Q. No.

15 A. Yes, you did.

16 You said the ROD remedy. Here it is
17 right in response number 10.

18 "EPA did state that
19 it had previously selected
20 appropriate remedial action
21 for the Midco sites based on
22 the ROD administrative
23 records. EPA has ample
24 authority to order both

1 implementation of the ROD
2 remedies and remedies for
3 the imminent and substantial
4 endangerment by the
5 administrative order."

6 Q. You just read into the record the
7 second paragraph of the formal response to
8 comment 10; is that right?

9 A. Yes.

10 Q. So, it is your testimony, is it not,
11 that you had made up your mind --

12 MR. TENENBAUM: He just testified --

13 MR. FINCH: Let me finish, Alan. Come on,
14 Alan, let me finish my question.

15 You can make your objection when I have
16 stated the question for the record.

17 MR. TENENBAUM: Okay.

18 MR. FINCH: Please.

19 Q. So, it is your testimony, is it not,
20 Mr. Boice, that because EPA had already selected
21 what in its view were appropriate remedial
22 actions for these sites, that you were not going
23 to await the comments of the respondents before
24 deciding the propriety of the ROD remedies in

1 terms of the 106 order?

2 MR. TENERBAUM: Objection. Confuses you
3 with EPA. Seeks discovery on the remedy issue
4 relating to the issuance of the administrative
5 order, and it is vague and ambiguous.

6 If you can limit your answer to your
7 impression of bad faith, go ahead and answer it.
8 But, I don't want you giving an answer --

9 I am going to have to instruct you not
10 to answer as to what the Agency's
11 decision-making process was in issuing the
12 order, but you can answer with respect to your
13 impression of bad faith.

14 A. I don't think I can answer any more
15 than I have already said regarding that issue.

16 BY MR. FINCH:

17 Q. Mr. Boice, I do not want to know about
18 what the Agency did or didn't do.

19 I want to know what you did or didn't
20 think.

21 Isn't it true that you thought
22 personally that since EPA had already selected
23 the ROD remedy, there was no reason to await the
24 comments of the respondents before concluding

1 that the ROD remedies were appropriate for
2 purposes of the 106 order?

3 MR. TENENBAUM: Same continuing objection,
4 but you can try and answer.

5 A. Well, it is not --

6 I don't understand what you mean by --
7 it is EPA's position and it is clearly indicated
8 in all our guidance documents.

9 MR. TENENBAUM: The question was your, not
10 EPA's position.

11 A. My view?

12 MR. TENENBAUM: Your view.

13 A. Of course, my view is that EPA had
14 selected the remedy and the ROD in accordance
15 with all the regulations, including receipt of
16 public comments from the respondents and
17 addressing your comments, your public comments,
18 as well as having some of those, the ROD
19 positions, verified during subsequent
20 investigations during the remedy.

21 That yes, that the ROD's remedy
22 would -- probably would not be affected by the
23 comments from the respondents.

24 MR. FINCH: All right. I have no further

1 questions right now.

2 I will have a few more after a lunch
3 break, which I think we ought to take, but it
4 won't be very, very long.

5 Why don't we take a break, then I will
6 have just a little bit more.

7 MR. KARAGANIS: Off the record.

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9
10 (Whereupon a recess was taken
11 until 2:30 o'clock P.M. of
12 the same day.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Civil Action
) No. H-79-556
) Third-Party
MIDWEST SOLVENT RECOVERY INC.;) Complaint
MIDWEST INDUSTRIAL WASTE DISPOSAL)
COMPANY, INC.; INDUSTRIAL TECTONICS,)
INC.; V & E CORPORATION; ERNEST DE)
HART; EDWARD D. CONLEY; HELGA C.)
CONLEY; LOVIE DE HART; CHARLES A.)
LIGHT; DAVID E. LIGHT; DELORES LIGHT;)
EUGENE ELISIAK; JEANETTE ELISIAK;)
LUTHER G. BLOOMBERG; ROBERT J. DAW-)
SON, JR.; JOHN MILETICH; MARY)
MILETICH; PENN CENTRAL CORPORATION;)
INSILCO CORPORATION; RUST-OLEUM, INC.;)
ZENITH RADIO CORPORATION; STANDARD T)
CHEMICAL COMPANY, INC.; AMERICAN CAN)
COMPANY, INC.; PRE FINISH METALS, INC.;)
PREMIER COATINGS, INC.; MOTOROLA, INC.;)
and DESOTO, INC.;)
)
Defendants.)
)
)
AMERICAN CAN COMPANY, INC.,)
DESOTO, INC., INSILCO CORPORATION,)
MOTOROLA, INC., PRE FINISH METALS,)
INC., PREMIER COATINGS, INC.,)
RUST-OLEUM, INC., STANDARD T)
CHEMICAL COMPANY, INC.,)
ZENITH RADIO CORPORATION, JOHN)
MILETICH, MARY MILETICH and THE)
PENN CENTRAL CORPORATION,)
)
Third-Party Plaintiffs,)
)
vs.)
)
ACCUTRONICS, ACTIVE SERVICE CORP.,)
AMERICAN NAMEPLATE & DECORATING CO.,)

1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APECO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASHLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARR)
4	MILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFORD MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO ROTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARK)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. HALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERRING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CRONAME, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CURRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF BEECHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DOBSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, EKCO HOUSEWARE)
	CO., EL-PAC, INC., ENBOSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GEARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., OLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
 PRODUCTS, KNAACK MFG. CO., LANSING)
 2 SERVICE CORPORATION, LAUTTER)
 CHEMICAL, LIQUID DYNAMICS,)
 3 LIQUID WASTE, INCORPORATED,)
 STEVE MARTEL, VASONITE CORPO-)
 4 RATION, MCWHARTER CHEMICAL CO.,)
 METAL DECLAINING CORPORATION,)
 5 METROPOLITAN CIRCUITS,)
 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 6 TANK LINES, MORTON THIOKOL INC.,)
 MR. FRANK, INC., NAMSCO, INC.,)
 7 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 8 INC., PASLODE COMPANY, PIERCE & STEVENS)
 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 R-LITE, REFLECTOR HARDWARE CORP.,)
 10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 RICHARDSON GRAPHICS, JOHN ROSCO,)
 11 ROTEMA INDUSTRIAL WASTE, ST. CHARLES)
 MANUFACTURING, SCHOLLE CORPORATION,)
 12 SCRAP HAULERS, SHERWIN WILLIAMS)
 COMPANY, SHELCO COATINGS, INC.,)
 13 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPECIAL COATINGS CO.,)
 14 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 15 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 16 STUART CHEMICAL & PLANT, INC.,)
 SUMNER & MACE, SUN CHEMICAL,)
 17 SYNTECH WASTE TREATMENT CENTER,)
 T.R.C., TREPAC, INC., ALFRED TENNY,)
 18 THIELE-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFFT CHEMICALS,)
 19 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
 UNIROYAL, INC., UNITED RESIN AD-)
 20 RESIVES, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
 21 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 22 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 23 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 24 WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
4
5
6
7

8 DEPOSITION OF RICHARD E. BOICE

9 AUGUST 1, 1990
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6 The continued deposition of RICHARD
7 EDWIN BOICE, called for examination by the
8 Defendants, pursuant to notice and pursuant
9 to the provisions of the Federal Rules of
10 Civil Procedure of the United States
11 District Courts, pertaining to the taking
12 of depositions for the purpose of
13 discovery, taken before Arnold N.
14 Goldstine, a Notary Public and Certified
15 Shorthand Reporter within and for the
16 County of Cook and State of Illinois, at
17 227 West Monroe Street, on August 1, 1990,
18 commencing at the hour of 9:00 o'clock p.m.
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APPEARANCES:

Mr. Alan E. Tenenbaum and
Mr. Leonard M. Gelman
Trial Attorney
Environmental Enforcement Section
Land & Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D. C. 20044

-and-

Mr. Michael R. Berman
Assistant Regional Counsel
Solid Waste & Emergency Response Branch
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Office of Regional Counsel
230 South Dearborn Street
Chicago, Illinois 60604

appeared on behalf of Plaintiff,
United States of America;

1 **APPPEARANCES (CONTINUED):**

2
3 **Mr. Michael R. Blankshain**
4 **Wilcman, Harrold, Allen & Dixon**
5 **225 West Wacker Drive**
6 **Chicago, Illinois 60606-1229**

7 **appeared on behalf of**
8 **Penn Central Corporation;**

9 **Mr. William G. Dickett**
10 **Sidley & Austin**
11 **One First National Plaza**
12 **Chicago, Illinois 60603**

13 **appeared on behalf of**
14 **Pre Finish Metals, Inc.;**

15 **Mr. Carl B. Hillemann**
16 **Sonnenschein Nath & Rosenthal**
17 **One Mercantile Center**
18 **Suite 2600**
19 **St. Louis, Missouri 63101**

20 **appeared on behalf of**
21 **Desoto, Inc.;**

22 **Mr. Joseph V. Karaganis**
23 **Karaganis & White, Ltd.**
24 **414 North Orleans Street**
 Chicago, Illinois 60610

appeared on behalf of
 American Can Company, Inc.;

1 **APPEARANCES (CONTINUED):**

2
3 **Mr. James T. J. Keating**
4 **Law Offices of James T. J. Keating, P.C.**
5 **Printers Row**
6 **542 South Dearborn Street**
7 **Chicago, Illinois 60605**

8
9 **appeared on behalf of**
10 **Premier Coatings, Inc.;**

11
12 **Mr. Edward J. Leahy**
13 **Leahy, Eisenberg & Fraenkel, Ltd.**
14 **309 West Washington Street**
15 **Chicago, Illinois 60606**

16 **appeared on behalf of**
17 **Scholle Corp.;**

18
19 **Mr. David S. Finch**
20 **McDermott, Will & Emery**
21 **227 West Monroe Street**
22 **Chicago, Illinois 60606-5096**

23
24 **Mr. Richard S. VanRheenen**
25 **Cromer, Eaglesfield & Maher, P.A.**
26 **Station Place**
27 **200 South Meridian Street**
28 **Indianapolis, Indiana 46225**

29 **appeared on behalf of**
30 **T & S Tin Mill Products Company,**
31 **Inc., et al.;**

1 APPEARANCES (CONTINUED):

2
3 Mr. John R. Adams
4 Taylor, Miller, Sprowl, Hoffnagle &
5 Merlatti
6 33 North LaSalle Street
7 Chicago, Illinois 60602-2602

8
9 appeared on behalf of Third-
10 Party Plaintiffs Desoto, et al.;

11
12 Ms. Carol Dorde
13 Seyfarth, Shaw, Fairweather & Geraldson
14 55 East Monroe Street
15 42nd Floor
16 Chicago, Illinois 60603

17
18 appeared on behalf of
19 Motorola, Inc.
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RICHARD E. BOICE,
having been previously duly sworn.
was examined and testified as follows:

DIRECT EXAMINATION
(CONTINUED)

BY MR. FINCH:

Q. Back on the record.

We are back on the record. Mr. Boice.
You are still under oath.

I call your attention, Mr. Boice, to
comment number 3, among the comments we were
discussing prior to the break, in Exhibit No.
50.

The comment states, quote:

"The United States
selected a remedy without
conducting adequate
treatability studies.
Treatability studies are
required to be part of the
FS process."

Do you see that statement?

A. Yes.

Q. Did that statement have any role to

1 play in your impression of bad faith?

2 A. I already answered that question.

3 Q. All right.

4 Refresh my recollection, what was your
5 answer?

6 A. No.

7 Q. All right.

8 Let's look at comment number 9. Did
9 that comment have any role to play in your
10 impression of bad faith?

11 MR. KARAGANIS: Which comment is that?

12 MR. FINCH: Number 9.

13 A. I already --

14 MR. KARAGANIS: What does it say? I am
15 trying to figure out. Is this the comment that
16 says the EPA failed to include in the ROD?

17 MR. FINCH: Right.

18 A. I already answered that question.

19 Q. I think you answered number 10 as well;
20 is that right?

21 MR. BERMAN: Yes.

22 A. Yes.

23 BY MR. FINCH:

24 Q. Okay. Go on to comment number 11.

1 What about comment number 11?

2 A. What is the question?

3 Q. Did it have any role to play in your
4 impression of bad faith?

5 A. Yes.

6 Q. What is that role?

7 A. Well, as you can see, it says:

8 "EPA artificially
9 manufactured a 106 claim
10 after negotiations broke
11 down and a trial date was
12 set."

13 In actuality, the procedure of going
14 from the 122 negotiation period, and if those
15 are unsuccessful, to follow that with the
16 unilateral administrative order, is a fairly
17 common practice in the Agency.

18 In fact, many of the respondents should
19 have been aware of this procedure since it was
20 used for the Ninth Avenue dump site and many of
21 the respondents are PRP's for the Ninth Avenue
22 dump site.

23 Q. Okay.

24 The phrase artificially manufactured.

1 To your recollection was that phrase included in
2 the actual comments submitted by any of the
3 respondents?

4 A. Probably.

5 Q. But you don't recall one way or the
6 other whether actually it was included?

7 A. I imagine because I -- since it was
8 written down this way, that it was included in
9 their actual working.

10 Q. You say you imagine because I, when we
11 said since it was written down this way.

12 What do you mean by I, did you write it
13 down this way.

14 MR. TENENBAUM: Hold it a second. I thought
15 we weren't going to ask him about the
16 compilation of this document?

17 MR. FINCH: Well, I didn't intend to ask him
18 about it. But, the response seems to imply that
19 Mr. Boice was the one who wrote it down this
20 way.

21 I want the record --

22 MR. TENENBAUM: I don't think the response
23 does imply that. He said -- I think the
24 response speaks for itself.

1 But, in any event, what is the
2 significance as to his impression of bad faith?

3 MR. FINCH: I think it does have some
4 significance and I don't think it is properly
5 objectionable or properly subject to an
6 instruction not to answer.

7 MR. TENENBAUM: I am not going -- I am not
8 going to instruct him not to answer questions on
9 who drafted the response. I will allow him to
10 answer -- well --

11 BY MR. FINCH:

12 Q. Are those your words, Mr. Boice,
13 artificially manufactured, or are those the
14 words of other people?

15 A. As I said before, since those are the
16 words written down, I imagine those are the
17 words used by Sidley & Austin and Desoto in
18 their Section 106 or in their comments on our
19 unilateral administrative order.

20 Q. What do you mean when you say, as you
21 did a moment ago, that it is a fairly common
22 procedure for administrative orders to follow a
23 120 day negotiation period?

24 MR. TENENBAUM: Objection to the extent it

1 calls for a legal conclusion or analysis.

2 IF you knew the answer, you may give
3 your answer.

4 MR. FINCH: I am not asking for a legal
5 analysis. I am just asking what the witness
6 meant when he said what he said.

7 MR. TENENBAUM: Same objection. You can
8 answer the best you can.

9 A. Well, under all our guidelines,
10 following the record of decision, we have a
11 120-day negotiation period.

12 And if that fails, then often the EPA
13 issues a unilateral administrative order,
14 ordering the potential responsible parties to
15 implement the selected remedial action.

16 BY MR. FINCH:

17 Q. What do you mean by often EPA issues a
18 unilateral administrative order?

19 MR. TENENBAUM: What don't you understand
20 about the word often? It is clear.

21 MR. FINCH: That's a pretty vague term.

22 In fact, I recall the Government
23 objecting to the use of the term often in
24 connection with this deposition at least three

1 or four times, it being vague and ambiguous. So
2 I want to know what this witness means by the
3 term often.

4 And I will concede right up front that
5 his conclusion will not be a legal conclusion,
6 and it will not represent the Agency's -- the
7 legal position with respect to the issue of the
8 administrative orders.

9 MR. TENENBAUM: I will let him answer the
10 best he can. But, I am going to have to object,
11 because you have not laid any foundation that
12 this witness knows anything about the
13 statistical frequency of issuing these orders.

14 MR. FINCH: You are right. I haven't laid
15 that foundation.

16 But, the witness said under oath that
17 often EPA issues administrative orders. Those
18 are his words, not mine.

19 I just want to know what the witness
20 meant by the use of the words contained in his
21 prior response.

22 MR. TENENBAUM: I am going to maintain my
23 continuing objection, but you can answer the
24 best you can.

1 A. I can't see how I can clarify that any
2 further.

3 BY MR. FINCH:

4 Q. You can't see how you can clarify what
5 is meant by often?

6 A. Yes.

7 Q. Can you see how you can clarify what
8 meant by the phrase fairly common practice,
9 which you used a few minutes ago to describe the
10 issuance of administrative orders following the
11 expiration of the 120-day period?

12 A. No. I don't see how I could clarify
13 that any further.

14 Q. Let me ask you, for how long has it
15 been a fairly common practice for EPA to issue
16 these orders, according to your understanding?

17 MR. TENENBAUM: Why don't you rephrase, if
18 you could rephrase the question, what is your
19 understanding.

20 MR. FINCH: All right.

21 Q. To your understanding, how long has it
22 been a fairly common practice for EPA to issue
23 administrative orders following expiration of a
24 120-day negotiation period?

1 A. That question has no relevance to
2 comment number 11, or my impression of that.

3 Q. Okay.

4 Could the reporter read the question
5 back to the witness.

6 (The record was read.)

7 MR. TENENBAUM: Subject to my continuing
8 objections already made, you can try and answer
9 that, if you know in answer, if you have such an
10 understanding.

11 A. Well, the key point is that in comment
12 number 11 they say FEA artificially manufactured
13 a 106 claim after the negotiations broke down.

14 When in actuality this is a common
15 procedure the Agency has followed at that time
16 and is following now. And it is not something
17 that would be considered unusual or artificially
18 manufactured.

19 BY MR. FINCH:

20 Q. Could the reporter read the question
21 back to the witness, please.

22 (The record was reread.)

23 A. I don't know.

24 Q. You don't know how long you have had

1 this understanding or you don't know how long
2 this has been the practice according to your
3 understanding?

4 A. As the question is stated, I don't know
5 how long the practice has been a fairly common
6 practice with EPA. I know it is something that
7 is being done --

8 MR. TENENBAUM: He wants to know how long
9 you have had such an understanding as the
10 question.

11 Maybe you don't understand it.

12 A. I don't understand the question.

13 MR. TENENBAUM: How long have you had an
14 understanding, this understanding you have
15 described?

16 A. Would you repeat the question?

17 MR. FINCH: If the court reporter could
18 repeat the question again, please.

19 (The question was reread.)

20 A. Okay.

21 That didn't indicate anything about my
22 understanding. But, I know it has been at least
23 since the management review report by -- it
24 started with Bill Reilly's taking over as

1 administrator of the EPA.

2 Q. For the record, what is a management
3 review report? I am not familiar with this
4 document.

5 A. I don't remember the name of it. But,
6 there was some type of -- it was called a 90-day
7 study. It was one of the recommendations of the
8 90-day study to increase enforcement efforts in
9 Superfund.

10 Q. Who is Bill Reilly?

11 A. The administrator of the US
12 Environmental Protection Agency.

13 Q. When did he become administrator of the
14 USEPA?

15 A. Shortly after George Bush was elected
16 President.

17 Q. So he was not administrator of USEPA at
18 the time that the partial consent decree was
19 entered by Judge Keanny?

20 A. I don't know what you mean. Who is
21 judge Keanny?

22 Q. Do you know whether it was a fairly
23 common procedure for USEPA to issue
24 administrative orders at the end of a 120-day

1 negotiation period prior to William Reilly's
2 appointment as administrator of "CEPA?"

3 A. All I know it was done for Ninth Avenue
4 dump and it was done for a number of other
5 sites.

6 Q. But do you know whether it was a fair
7 common procedure or practice?

8 MR. TENENBAUM: His understanding?

9 MR. FINCH: To your understanding.

10 A. To my understanding, yes.

11 Q. Do you have any understanding as to
12 whether the partial consent decree addresses the
13 issue of administrative orders or the propriety
14 of the Agency issuing administrative orders,
15 again just to your understanding?

16 MR. TENENBAUM: Same objection.

17 This has really gone far aground on
18 legal interpretation of the first consent
19 decree.

20 If you think you know the answer, you
21 can try and answer it. But I have to object.

22 A. I don't understand the question.

23 BY MR. FINCH:

24 Q. Let me rephrase it.

1 To your understanding, is there
2 anything in the partial consent decree which
3 addresses the circumstances in which USFPA can
4 issue administrative orders in this case?

5 MR. TENENBAUM: Objection, calls for a legal
6 conclusion.

7 BY MR. FINCH:

8 Q. Just to your understanding.

9 MR. TENENBAUM: Still calls for a legal
10 conclusion.

11 Do you want me to notice the deposition
12 from someone from Standard T who is familiar
13 with the consent decree and ask them about what
14 their understanding of the terms are? Will you
15 allow me to do that?

16 MR. FINCH: Probably not. But then again my
17 client is the respondent. My client is not the
18 government.

19 MR. TENENBAUM: Your client is making
20 arguments in this case about the partial consent
21 decree.

22 MR. FINCH: Are you instructing him not to
23 answer this question?

24 MR. TENENBAUM: He is not a lawyer. How can

1 he answer it?

2 MR. FINCH: I want to know his understanding
3 of the provisions of the partial consent decree
4 at this point. I don't intend to ask him a lot
5 of questions.

6 MR. TENENBAUM: Subject to my objection, if
7 he knows it, if he has such an understanding,
8 will let him try, but only if you have one.

9 You are not a lawyer. If you know it,
10 if you think you have one, subject to my strong
11 objections, I will let you answer.

12 A. Well, I know that the partial consent
13 decree specifically reserves EPA's rights under
14 Section 106, which includes the right to issue
15 unilateral administrative order.

16 BY MR. FINCH:

17 Q. Was there ever a time to your knowledge
18 that EPA informed the Midco Steering Committee
19 or any of its agents that it was considering
20 issuing the unilateral administrative orders in
21 the event that the 120-day negotiation period
22 expired without a final agreement between the
23 parties or among the parties?

24 A. I know we stated or someone on our team

1 stated that we would take proper enforcement
2 actions following, if we don't reach an
3 agreement after the 120-day negotiation period.

4 Q. Who is that?

5 MR. TENENBAUM: I don't know what we are
6 getting into here.

7 But, I am going to object to the extent
8 we are discussing settlement negotiations. But,
9 I will let him answer.

10 MR. FINCH: This is a notice issue that is
11 relevant to this witness' testimony about the
12 impact of comment 11.

13 Q. Who is this person on the team who so
14 advised the Midco Steering Committee?

15 MR. TENENBAUM: Same continuing objection,
16 but you may answer if you know.

17 A. Well, Joel Gross was our spokesman.

18 Q. Was he the one who gave this advice to
19 the Midco Steering Committee?

20 A. I am sure he made some statement as to
21 that effect, yes.

22 Q. As to that effect?

23 A. Yes.

24 Q. Do you know what words he used?

1 A. No, I don't.

2 Q. Do you recall generally what word he
3 used?

4 A. I already told you generally what word
5 he used.

6 Q. What generally were the words that you
7 told me he used?

8 A. Could you restate it?

9 UP. TENENBAUM: He wants you to read back
10 his answer two or three questions ago about --
11 BY MR. FINCH:

12 Q. I am not asking you what the effect of
13 his words were. I am asking what the words
14 were, as closely as you can remember.

15 MR. TENENBAUM: I think the witness is
16 indicating that what he said before was his best
17 recollection of the words. He wants it read
18 back.

19 BY MR. FINCH:

20 Q. Appropriate enforcement steps, is that
21 what he said?

22 A. What did I -- I would like to --

23 Q. I don't want to know what you
24 remembered about three minutes ago. I want to

1 know what you remember right now.

2 MR. TENENBAUM: I will object to this line
3 of questioning as it is not proper, but do your
4 best.

5 A. As I stated before, he generally said
6 if the negotiations were unsuccessful, that it
7 is, the 120-day negotiations period was
8 unsuccessful, then we would pursue our
9 enforcement options.

10 BY MR. FINCH:

11 Q. Pursue enforcement options.

12 So that as you sit here right now at
13 2:01 p.m., August 1, 1990 is what you recall
14 Gross having said?

15 A. That is what I just said.

16 Q. All right.

17 MR. TENENBAUM: You don't mean the exact
18 words, you mean the substance?

19 MR. FINCH: As close as this witness can go.

20 MR. TENENBAUM: Right.

21 MR. FINCH: To telling me his exact words.

22 MR. TENENBAUM: I think he has indicated he
23 didn't remember the exact words. I don't think
24 it would be fair to say those were the exact

1 words.

2 A. I am pretty sure those were the words
3 also.

4 MR. FINCH: Okay.

5 Q. Let's start with the oral advice. In
6 was that given?

7 A. I don't remember.

8 Q. Do you recall what year it was given?

9 A. It would have been 1999.

10 Q. Do you recall what time during the year
11 it was given?

12 A. No.

13 Q. Could it have been in the spring of
14 '99?

15 A. I'm not sure.

16 Q. Summer?

17 A. Possibly.

18 Q. Fall?

19 A. Possibly.

20 Q. Early winter?

21 A. No.

22 Q. Couldn't have been early winter, why
23 not?

24 A. Because the negotiation period ended in

1 September of 1989, so it was prior to that.

2 Q. Any time prior to the end of the
3 negotiation period in 1989 during the year 1989,
4 was that your testimony?

5 A. My testimony is that is to the best of
6 my recollection, and there might have been some
7 earlier references to that.

8 Q. And to whom did he give this advice
9 specifically?

10 A. It wasn't advice, it was information.

11 Q. Okay.

12 To whom did he relate this information
13 specifically?

14 A. To the Midco defendants.

15 Q. Who, what people?

16 MR. TENENBAUM: Same continuing objection.

17 BY MR. FINCH:

18 Q. Do you remember?

19 A. Okay.

20 Well, if you look in your records you
21 could probably find a letter that made a
22 statement to that effect.

23 Q. Well, I am not asking what my records
24 would show.

1 A. It would have been made to the people
2 participating in the negotiations with the
3 government.

4 Q. We are talking about an oral statement
5 because you alluded to an oral statement, and
6 then you said he may have said or you think he
7 said the same thing in writing as well.

8 A. So let's talk about the oral statement
9 only.

10 Q. Do you recall him making this in the
11 form of an oral comment in a room of people?

12 A. I'm pretty sure he did, but I am not
13 absolutely sure.

14 Q. Do you recall who was in that room of
15 people?

16 A. It would have been the negotiators with
17 the Midco Steering Committee.

18 Q. Do you recall who those negotiators
19 were?

20 MR. TENENBAUM: I continue my objections to
21 these questions on settlement negotiations.

22 For now I am going to let him answer
23 subject to my objection.

24 MR. FINCH: I am not at all sure that this

1 comment was made in the context of settlement
2 negotiations. That is not necessarily a fair
3 reading of what this witness has testified to.

4 MR. TENENBAUM: Didn't he say it was during
5 the negotiation period.

6 MR. FINCH: He said it could not have been
7 after the negotiation period.

8 There is nothing in the record thus far
9 that indicates that this was a statement made in
10 the context of settlement. It doesn't strike me
11 as one that is made in the context of
12 settlement.

13 MR. TENENBAUM: To the extent it was, I
14 reiterate my objections. You can try and
15 answer.

16 A. Well, you should know who the
17 negotiators were as well as the government.

18 BY MR. FINCH:

19 Q. Not everybody showed up for every
20 meeting.

21 I am asking you who you remember this
22 statement having been made in front of?

23 A. Okay.

24 Well, you could probably consult with

1 your own attorneys and get a list. But it
2 includes --

3 Q. I never consult with my attorneys.

4 A. Tim Barker, and Jeff Fort.

5 Q. So, is it your testimony that Tim
6 Barker and Jeff Fort were present when this
7 statement was made?

8 A. Probably.

9 Q. It is your testimony they were probably
10 present when this statement was made?

11 A. That's what I said.

12 Q. Okay.

13 Who else?

14 A. Probably Art Schlessinger, Roy Hall.
15 I'm not sure who else.

16 Q. Was anyone present representing the
17 United States other than Joel Gross and
18 yourself?

19 A. Probably Mike Berman and myself were
20 there.

21 Q. And it is your testimony that --

22 By the way, was this in a meeting that
23 was held on government property?

24 A. Probably, I'm not sure though. No. It

1 would have been someplace else.

2 Q. Like where else?

3 A. McDermott, Will & Emery is where we had
4 our negotiation meetings.

5 Q. So you think it was probably at

6 McDermott, Will & Emery's offices?

7 A. Probably.

8 Q. And it is your testimony that Joel
9 Gross also made this statement in writing?

10 A. As I stated before, as far as I know.
11 I'm pretty sure there was something to that
12 effect in writing. And this is all to the best
13 of my recollection.

14 Q. At the time that that writing was made,
15 is it your recollection or understanding that
16 EPA had been actively considering issuing
17 administrative orders?

18 A. What?

19 Q. Is it your recollection or
20 understanding that at the time that this writing
21 by Joel Gross was made, USEPA had in fact been
22 considering issuing administrative orders.

23 MR. TENENBAUM: Wait a second now.

24 You are asking, you want to know about

1 the Agency's deliberative process on enforcement
2 options. That is clearly objectionable.

3 MR. FINCH: I don't want to know anything
4 about their deliberative-process.

5 I just want to know whether at the time
6 that Joel Gross supposedly told the respondents
7 that if they don't settle the Agency will
8 consider its enforcement options, whether the
9 Agency was in fact at that time considering
10 these enforcement options.

11 MR. FENEBAUGH: No.

12 I think that you are asking for
13 attorney work product and attorney-client
14 deliberative-process information.

15 You would surely object if I noticed
16 the depositions of any Standard T personnel or
17 lawyers and asked them what they were
18 considering doing with respect to the case at
19 the time of the negotiations.

20 MR. FINCH: Alan, that's not even a fair
21 analogy.

22 We have testimony from this witness
23 that there was a communication from a government
24 lawyer to the respondents or to the participants

1 in the settlement negotiations telling them that
2 if they didn't settle, the Agency would consider
3 its enforcement options, or words to that
4 effect.

5 That's not a privileged communication.
6 That is a statement by the government.

7 MR. TENENBAUM: You are not asking about
8 that communication.

9 MR. FINCH: Now I am asking whether at the
10 time that this communication was made the Agency
11 was in fact considering these enforcement
12 options.

13 MR. TENENBAUM: I am sorry, but that is a
14 question asking the Agency as to what its
15 deliberative-processes were and what its
16 attorney-client communications were and what its
17 attorney work product was.

18 MR. FINCH: I don't understand that at all.
19 Are you instructing him not to answer?

20 MR. TENENBAUM: I am afraid I will have to.

21 MR. FINCH: You are instructing him not to
22 answer?

23 MR. TENENBAUM: I am sure Standard T was
24 considering its options at the time, and I don't

1 think you would allow me to ask the people about
2 that either.

3 MR. FINCH: Standard T didn't send
4 threatening letters to USFPA either.

5 MR. TENENBAUM: I won't get into what
6 Standard T did in this case.

7 A. I don't think that was a threatening
8 letter. It is just providing information on
9 what the Agency was --

10 MR. TENENBAUM: There is no question
11 pending. We don't concur, necessarily concur,
12 with your description.

13 BY MR. FINCH:

14 Q. Take a look at comment 12.

15 Does that comment have any role to play
16 in your impression of bad faith?

17 A. No.

18 Q. How about comment 13?

19 A. No.

20 Q. Comment 14?

21 A. Yes.

22 Q. Okay.

23 For the record, so the record is clear,
24 comment 14 states, quote:

1 "EPA personnel have
2 informed Gary and Hammond
3 officials and the public
4 that the Wisco site is not
5 an imminent threat, and that
6 the dike originally --" I
7 think it should be "--
8 placed along Cline Avenue to
9 prevent waste run-off or
10 migration from Wisco site to
11 populated areas is no longer
12 necessary and serves no
13 environmental purpose."

14 How is that statement connected with
15 your impression of bad faith?

16 A. Again, it doesn't seem to be an honest
17 statement because the newspaper article referred
18 to didn't make any statements regarding an
19 imminent threat at the site.

20 So basically the statement, comment
21 included in comment 14 doesn't seem to honestly
22 represent the facts.

23 BY MR. FINCH:

24 Q. You are testifying that EPA personnel

1 did or did not make any statements concerning ..
2 imminent threat?

3 A. Well, there was some type of newspaper
4 article submitted with that, these comments.
5 And that newspaper article made no mention of
6 EPA making a statement that there was not an
7 imminent threat.

8 Q. As you read that, that is your reading
9 of the newspaper article?

10 A. That is what the newspaper article --
11 As I stated before, the newspaper
12 article did not state that there was an imminent
13 threat or that EPA said that there was not an
14 imminent threat at the site.

15 Q. What did the article say?

16 A. I don't know. I would have to read it.

17 Q. You don't remember what the article
18 stated?

19 A. Not off the top of my head, no.

20 Q. But you do remember that it didn't say
21 anything about an imminent threat?

22 A. Yes, because it is specifically stated
23 in response 14.

24 Q. Isn't it true that EPA personnel

1 informed Gary and Hammond officials that the
2 video I site does not present an emergency?

3 A. I think we stated something to that
4 effect. Yes.

5 Q. When did you state that?

6 A. There was a meeting with Gary and
7 Hammond officials and the parish priest on that
8 issue.

9 Q. Do you recall when that meeting took
10 place?

11 A. It was probably, I don't remember
12 exactly when it was.

13 Q. Roughly what month or year it was?

14 A. No, I don't remember.

15 MR. TENENBAUM: Same continuing objection to
16 the question.

17 A. I don't remember. It was during the
18 summer, that's all I remember.

19 BY MR. FINCH:

20 Q. So the summer of 1989?

21 A. Possibly.

22 Q. Not the summer of 1988?

23 A. I don't remember. It could have been.

24 Q. Okay.

1 And who called this meeting?

2 A. A parish priest.

3 Q. What is your understanding of the
4 reason that meeting was called?

5 MR. TENENBAUM: We have now gone far from
6 from the impression of bad faith.

7 The impression of bad faith does not
8 use the word emergency. I don't see how this
9 has anything to do with that.

10 MR. FINCH: It strikes me that the term
11 emergency and the term imminent threat are so
12 close as to be synonymous.

13 MR. TENENBAUM: That is your position.

14 MR. FINCH: Well, I want this witness to
15 explain to me why in the context of the
16 newspaper article and the events underlying the
17 newspaper article in response 14, they are not
18 synonymous. I am entitled to find out this
19 witness' understanding.

20 MR. TENENBAUM: I think the response speaks
21 for itself.

22 MR. FINCH: I am entitled to ask follow-up
23 questions, Alan. Let me ask my questions. I am
24 almost done here.

1 Q. What is your understanding, Mr. Boice,
2 as to why this priest called this meeting?

3 MR. TENENBAUM: Subject to my continuing
4 objections, I will let you answer.

5 We are getting far afield.

6 A. To resolve an issue of whether or not a
7 dike placed across Ninth Avenue separating Gary
8 and Hammond was necessary to be there for
9 environmental and public health reasons.

10 BY MR. FINCH:

11 Q. And EPA took the position that such a
12 dike was not necessary?

13 A. I wouldn't say we had -- that EPA took
14 an initial position. But, that was our, the
15 advice for the people who attended. That was
16 myself and Allison Hiltner.

17 Q. You told the people who attended the
18 meeting that the dike would not be necessary?

19 A. We suggested, yes, that as it said,
20 yes, that it wouldn't, flood waters into Hammond
21 would not be a significant threat to human
22 health in the event of a flood.

23 Q. You also told the people present at the
24 meeting that the Midco site did not present an

1 emergency, isn't that true?

2 MR. TENENBAUM: Fair to second.

3 You go from the specific to the general
4 and you bounce back and forth. You are trying
5 to confuse the witness or the record or both.
6 mean, the witness is talking about surface
7 run-off and you keep on shifting back and forth.

8 Which do you want to know about?

9 MR. FINCH: I would kind of like to ask
10 about them at the same time.

11 MR. TENENBAUM: I don't that is fair. I
12 think you get a confused record that way.

13 It may be the only way you can get the
14 answer that you want. But, I will have to
15 object on the basis of vague and compound.

16 MR. FINCH: I am only asking one question a
17 a time, Alan.

18 O. The question I am asking right now is
19 that isn't it true that during the meeting you
20 advised the people who were present at the
21 meeting that the Midco I site did not present a
22 emergency?

23 MR. TENENBAUM: As to the surface run-off
24 issue?

1 MR. FINCH: As to any issue.

2 MR. TENENBAUM: All right.

3 He is not asking about just surface
4 run-off. He wants to know whether at the
5 meeting you discussed all -- did you say
6 emergency this time?

7 MR. FINCH: The word is emergency.

8 Q. Isn't that what you told them?

9 MR. TENENBAUM: He wants to know whether or
10 not you discussed whether anything to do with
11 the Midco I site presented an emergency. Not
12 just the surface run-off. Anything.

13 A. Okay.

14 Now that I have read the response
15 again, I realize that the meeting was focusing
16 on the surface run-off issue. And that it
17 really didn't address any emergency conditions
18 at Midco I, other than what might be caused by
19 flooding conditions at the site, flowing back
20 into Hammond.

21 BY MR. FINCH:

22 Q. And you told them that there was no
23 emergency as to possible flooding conditions at
24 the site?

1 A. Yes.

2 Q. Is that currently your position, that
3 if there were flooding conditions at the site,
4 they would not present an emergency?

5 A. I wouldn't call it a position. It is
6 my understanding based on the data I have
7 reviewed and the risk assessments I have
8 reviewed.

9 Q. So if flood waters were to invade the
10 site, the presence of those flood waters and in
11 fact that those flood waters would sooner or
12 later migrate from the site would not now to
13 your understanding present an emergency
14 situation at Midco I?

15 MR. TENENBAUM: Same continuing objection.

16 A. I think that is what I have said.

17 BY MR. FINCH:

18 Q. Why is that, why wouldn't they present
19 an emergency condition?

20 MR. TENENBAUM: Same continuing objection.

21 A. Okay.

22 This doesn't have anything to do with
23 comment 14 any more.

24

1 BY MR. FINCH:

2 Q. I think it does. And you do not have
3 an instruction not to answer the question.

4 So I would appreciate it if you would
5 go ahead and answer it, so that I can complete
6 my portion of this deposition.

7 A. It doesn't have anything to do with it
8 basically. It is getting into the risk
9 assessment.

10 MR. TENENBAUM: Can you tell us how this has
11 anything to do with comment 14? Whether or
12 not --

13 I mean, comment 14 does not even -- he
14 has already covered the point. Comment 14 says
15 that -- maybe you need to break down your
16 foundation question and ask him whether or not
17 the -- there is a compound sentence in comment
18 14.

19 He has already testified that the first
20 half of that may have contributed to his
21 impression of bad faith.

22 I don't know whether or not the second
23 parte had any contribution to.

24 A. Right. It was just the first part

1 regarding imminent threat.

2 MR. TENENBAUM: He has already fully
3 explained the first half of that.

4 If you want to explore the second part
5 of it now. He just indicated just now that
6 wasn't his impression of bad faith.

7 The first part, you already went full-
8 over that when he explained that they said that
9 as to Midco I, this contributed, the article
10 stating by EPA that the Midco site was not an
11 imminent threat, and he explained his response.

12 MR. FINCH: Are you instructing the witness
13 not to answer?

14 MR. TENENBAUM: Yes. You haven't laid a
15 foundation, now that the witness has clarified
16 that his impression of bad faith only pertains
17 to the first half of the sentence.

18 MR. FINCH: The foundation is that the first
19 half of the sentence, quite simply, which this
20 witness finds to be evidence of bad faith or
21 contributed to his impression of bad faith,
22 states that EPA personnel have informed certain
23 officials that the Midco I site is now an
24 imminent threat.

1 And I want to understand precisely why
2 this witness thinks that it is not an imminent
3 threat.

4 MR. TENENBAUM: That has been asked and
5 answered. I think you should move on.

6 MR. FINCH: And I want to understand the
7 witness' conception of what an imminent threat
8 is, so that I can understand the answer that he
9 gave.

10 MR. TENENBAUM: I think, I mean I don't want
11 to testify for the witness. I am going to let
12 his testimony speak for itself.

13 But, it seems to me that that is not
14 relevant to your point. Because, I thought the
15 witness said that the comment grossly
16 exaggerated whatever the newspaper article said.

17 A. Basically that the comment makes a
18 statement that's not in the newspaper article.

19 MR. TENENBAUM: Right. So what more do you
20 need?

21 A. That is basically the --

22 BY MR. FINCH:

23 O. Throughout this --

24 A. That is the basis of my impression,

1 negative impression, about that statement.

2 Q. Throughout this deposition, this
3 witness has used terms of art, key words,
4 important words. And when I have tried to find
5 out what this witness means by those words,
6 Alan, you have objected principally on relevance
7 grounds and you have quite frequently instructed
8 the witness not to answer.

9 MR. TENENBAUM: On record-review grounds,
10 not relevancy.

11 MR. FINCH: Which is a relevancy issue.

12 MR. TENENBAUM: Not entirely, no.

13 MR. FINCH: At least you have created it as
14 such.

15 MR. TENENBAUM: No, I have not.

16 MR. FINCH: What we have is a lot of words
17 here, words that came from the witness' mouth,
18 not mine.

19 MR. TENENBAUM: No, they come from the
20 comments' mouth.

21 A. They are right in the written comments
22 right there.

23 MR. FINCH: That I cannot get defined by
24 this witness.

1 MR. TENENBAUM: They come from your client
2 or your co-counsel's clients.

3 MR. FINCH: That's just this witness'
4 impression.

5 A. There it is, imminent threat.

6 MR. FINCH: I have repeatedly asked follow-up
7 questions. I have been repeatedly cut off.

8 MR. TENENBAUM: No, we haven't.

9 MR. FINCH: I just don't think it is fair.

10 MR. TENENBAUM: I think I have bent over
11 backwards to let you ask these questions on his
12 impression of bad faith. Which is now what you
13 have been doing for many days.

14 I don't know what more you can want.

15 I hope that you will be as gracious in
16 allowing us to ask questions on the bad faith
17 issue when we take the depositions of
18 Geosciences and ERM and anyone else who may have
19 knowledge on this.

20 MR. FINCH: I am sure I will be very
21 gracious.

22 One moment, please. I just have one
23 more question for you, short line of
24 questioning.

1 Q. You have testified a couple of times in
2 this deposition, Mr. Poice, that you never
3 insisted that ERM or Geosciences or Dames &
4 Moore make changes in draft RI or FS documents.

5 To be more precise about it, when I
6 have used the word insisted, you have pointed
7 out that that word is incorrect.

8 Is it in fact your position that you
9 never insisted on any changes in any draft
10 documents?

11 A. I don't remember making that statement,
12 that I never insisted on making changes.

13 I think whenever we had -- we reviewed
14 the documents, we communicated. Sometimes we
15 communicated comments informally so we could
16 discuss them before we prepared the final
17 comments.

18 Then we prepared a final comment
19 letter, which included a list of changes, or
20 comments that had to be addressed to gain EPA's
21 approval.

22 Q. So there were occasions when ERM or
23 Dames & Moore or Geosciences perhaps presented
24 documents to you and you said they would have to

1 be changed in order for EPA to give its
2 approval?

3 A. Yes.

4 Q. Do you know of any instance in which
5 changes were not made in accordance with your
6 insistence?

7 A. I wouldn't call that insistence.

8 Q. What would you call it?

9 A. I would call it in accordance with the
10 Agency's comments which they could always come
11 in and say they disagreed with comments and
12 discuss them with us.

13 They could ignore them and then we
14 would review it on the next draft, or they could
15 pursue a dispute resolution through the Midco
16 Steering Committee.

17 Q. Do you know of any request that you
18 made for a change in any draft prepared by
19 Geosciences, Dames & Moore or ERM that was not
20 ultimately complied with?

21 MR. TENENBAUM: You mean responded to? What
22 do you mean by complied with?

23 A. You mean any of our comments that
24 weren't responded to?

1 BY MR. FINCH:

2 Q. No.

3 I mean a request where you wanted
4 something changed. It may have taken the form
5 of a comment. But, where you indicated to any
6 of these contractors that you wanted something
7 in a draft changed.

8 Do you know of any --

9 MR. TENENBAUM: In order to get the Agency
10 approval?

11 MR. FINCH: I suppose implicit would be if
12 they don't change it, there wouldn't be Agency
13 approval. But, that is not necessarily the
14 case.

15 MR. TENENBAUM: But I thought that is what
16 his testimony was. I don't think he has
17 testified about something else.

18 MR. FINCH: I am not adopting his testimony
19 I am just asking questions.

20 MR. TENENBAUM: That creates an ambiguity in
21 your question.

22 If you are not going to follow with his
23 testimony, then you have to break down his
24 testimony into comments, change requests, in

1 order to get the Agency approval, and these
2 other comments, change requests, that you
3 contend were different from that.

4 MR. FINCH: Let's break it down.

5 Q. Were there any requests for a change in
6 any draft issued by EPA to Dames & Moore or ERM
7 or Geosciences that was not made in the context
8 of Agency approval of an ultimate document?

9 A. I don't know. I don't understand your
10 question.

11 Q. You occasionally requested changes of
12 these contractors, isn't that right, changes in
13 documents that they had prepared?

14 A. Yes.

15 Q. And it is your position that you
16 indicated in some cases that if they did not
17 make these changes, the Agency would not approve
18 the final document?

19 A. I think so, yes.

20 Q. Okay.

21 So that is one class of changes. All
22 right.

23 A. Uh-hum.

24 Q. Ones that were made in the context of

1 the Agency not approving the final document
2 unless the changes were made.

3 A. Uh-hum.

4 Q. Were there other changes requested?

5 A. Okay.

6 I didn't always -- well, I usually
7 provided the comments and told them to address
8 them, in order to gain the Agency's approval.

9 And sometimes some comments that they
10 didn't -- they didn't address or they didn't
11 make some of the changes, and we accepted it
12 anyway because we thought it was overall an
13 acceptable document, or maybe they had convinced
14 me that they were right in a certain area.

15 Q. Did you ever convince them that you
16 were right?

17 A. I presume we did, since they accepted
18 some of our comments and made the revisions and
19 didn't discuss it further.

20 Q. Would you say that there was
21 give-and-take on both sides in the preparation
22 of the RI/PS?

23 A. Yes.

24 Q. Would you say that the contractors

1 retained by the Steering Committee gave more
2 than they took, is that fair?

3 MR. TENENBAUM: I don't understand that one.

4 MR. FINCH: All right.

5 A. I don't understand the question.

6 Q. All right.

7 Would you say that EPM, James & Moore
8 and Geosciences gave more than they took, do you
9 understand that question?

10 A. Gave more what?

11 Q. That they made more, that you convinced
12 them more often than they convinced you about
13 proposed changes in the document?

14 A. Yes.

15 MR. FINCH: I have no further questions at
16 this time.

17 I want the record to be clear that we
18 are not terminating Standard T's deposition of
19 Mr. Boice at this point.

20 MR. TENENBAUM: I am sorry to interrupt you.
21 That last question I was confused as to
22 give-and-take as to which was more than the
23 other.

24 We can have it read back if you want.

1 Is your question, I thought you asked who
2 convinced whom more.

3 MR. FINCH: Why don't you read the question
4 back.

5 (The question was read.)

6 MR. WENENBAUM: Okay.

7 MR. FINCH: I was saying that I have no
8 further questions at this point.

9 We are not terminating the deposition
10 of Mr. Boice. Standard T's deposition is still
11 open.

12 In the event that we have a handful of
13 follow-up questions that occur to us before the
14 close of this coordinated deposition, we reserve
15 our right to ask them. Although, I assure
16 counsel that there won't be many of them, if
17 there are any at all.

18 We do reserve the right to question Mr
19 Boice along any lines of examination that were
20 cut off by the government's instructions not to
21 answer at various points throughout this
22 deposition.

23 And we reserve the right to addition
24 follow-up questions that may occur to us due to

1 information that becomes available to us in the
2 course of discovery from this time until the
3 close of discovery in the lawsuit.

4 MR. TENENBAUM: I am not going to bother
5 making a response to that. I don't think one is
6 required.

7 I will just say that I am not taking
8 any position on any of those reservations of
9 rights at this time because I don't want to get
10 into a long discussion on the record.

11 MR. FINCH: Off the record for a moment.

12 (Whereupon a short recess was had.)

13 MR. KARAGANIS: Would you mark this as
14 Exhibit 52 of the Boice deposition.

15 (The document above-referred to
16 was marked Boice Deposition

17 Exhibit No. 52 for identification.)

18 Let the record show that what has been
19 marked for identification as Exhibit 52 of the
20 Boice deposition is the Rule 30 (b) 6 notice,
21 notice of deposition pursuant to Rule 30 (b)(6)
22 of the Federal Rules of Civil Procedure served
23 on the United States by American Can Company for
24 production of a witness or witnesses, designated

1 witness or witnesses, having information with
2 respect to certain listed categories of facts;
3 those facts and there categories being set forth
4 in Schedule A.

5 MR. TENENBAUM: For the record, we filed
6 objections to that request and our designation
7 and I believe they are already an exhibit to
8 earlier round of these depositions.

9 MR. KARAGANIS: The objections are already
10 an exhibit.

11 DIRECT EXAMINATION

12 BY MR. KARAGANIS:

13 Q. Mr. Poice, when did you first become
14 involved in the Midco controversy?

15 A. What do you mean by the Midco
16 controversy?

17 Q. Well, the need to clean up or to
18 address either the Midco I site or the Midco II
19 site.

20 A. I first became involved in the Midco
21 projects as I have already stated in previously
22 testimony around March 1985.

23 Q. And in what capacity was that, was that
24 remedial program manager?

1 A. As the remedial project manager.

2 Q. Remedial project manager. And who was
3 your predecessor?

4 A. The previous remedial project manager
5 was Karen Waldvogel. W-a-l-d-v-o-g-e-l.

6 Q. What was the reason for replacing Karen
7 Waldvogel?

8 A. She got a new job.

9 Q. Within EPA?

10 A. Yes.

11 Q. At the time that you took over, did you
12 have occasion to review the documents that
13 existed in the files of EPA with respect to
14 either Midco I or Midco II?

15 A. I reviewed as many as I could, yes.

16 Q. All right.

17 In your actions taken with respect to
18 either the Midco I or Midco II sites, are there
19 various legal rules or regulations or statutory
20 obligations which the EPA must follow in
21 evaluating and taking action with regard to
22 these sites?

23 A. I don't understand your question.

24 Q. Well, what rules are you bound by, what

1 rules do you follow in deciding, one, whether
2 you are going to evaluate a site; and, two,
3 whether you are going to take certain actions
4 with respect to a site?

5 MR. TENENBAUM: Objection to the extent it
6 calls for a legal conclusion.

7 BY MR. KARAGANIS:

8 Q. Go ahead.

9 A. Those are generally spelled out in the
10 National Contingency Plan, which is a federal
11 regulation.

12 Q. All right.

13 Is that 40 CFR Part 300?

14 A. I think so, yes.

15 Q. All right.

16 And with respect to the Midco I site,
17 when you took over, did you familiarize yourself
18 with any remedial actions that had taken place?

19 MR. TENENBAUM: I have to object as
20 ambiguous. Do you mean removal actions? I am
21 not sure what you mean.

22 BY MR. KARAGANIS:

23 Q. Are you familiar with the distinction
24 between removal and remedial actions under 40

1 CFR Part 300?

2 A. Yes.

3 Q. Do you understand my question?

4 A. You mean prior to the -- you don't mean
5 prior to the Midco I removal?

6 Q. Well, let's go back chronologically.

7 Did the Midco I removal that you
8 referred to take place before or after the
9 listing or the placement of the site on the
10 National Priorities List?

11 A. Before.

12 Q. Okay.

13 Now, to the extent you recall, let's
14 take the chronology with respect to removal
15 actions at the Midco I site. I take it there
16 was a removal action?

17 A. Yes.

18 Q. What was that removal action?

19 A. In 1982, EPA removed all the surface
20 containers from the site and the first I think
21 it was one foot of highly contaminated soil from
22 the site and transported it off-site for
23 disposal.

24 It also put on a temporary clay cover

1 over most of the site.

2 Q. Plus a temporary clay cover.

3 Plus all surface drums; is that right?

4 A. That's correct.

5 MP. TENENBAUM: Are we proceeding under a
6 general notice of deposition, as he has
7 indicated he started in 1952?

8 MR. KARAGANIS: One of the things that I am
9 attempting to develop, among other things, is
10 what is the basis of liability and what defense
11 may be available to my client, and that includes
12 whether or not EPA's actions have been in
13 compliance with the law. I am laying a
14 foundation for that.

15 MR. TENENBAUM: A couple problems is why I
16 asked the question, is that -- I will let him
17 answer if you want to ask about his personal
18 knowledge.

19 But, I am not sure that if we are
20 designating somebody on that, that he would be
21 the one to be designated, since he wasn't there
22 then.

23 That is why I asked if you are
24 proceeding under the Standard T notice of

1 deposition.

2 MR. KARAGANIS: I am also proceeding under
3 category 2 which relates to whether removal
4 costs incurred by the United States at the Widdow
5 sites are consistent or inconsistent with the
6 National Contingency Plan.

7 MR. TENENBAUM: Are these precluding '85?

8 MR. KARAGANIS: I don't know what removal
9 costs.

10 MR. TENENBAUM: Maybe we need to establish a
11 foundation as to whether or not the pre-'85 costs
12 are ones that EPA is seeking to recover from
13 American Can Company.

14 MR. KARAGANIS: I think that to the extent
15 that you are asking to address what may be
16 endangerment costs now --

17 MR. TENENBAUM: I will let him answer.

18 I just want to make it clear that he is
19 not the Agency's designee on describing the '82
20 cleanup, since he wasn't there then.

21 BY MR. KARAGANIS:

22 Q. Go ahead.

23 MR. TENENBAUM: It is only his personal
24 knowledge. Personal knowledge that he is picked

1 up from reading the files. You don't have any
2 problem with that?

3 BY MR. KARAGANIS:

4 Q. Go ahead.

5 MR. TENENBAUM: Okay.

6 A. What was the question?

7 MR. KARAGANIS: Would you read it back, Mr
8 Reporter.

9 (The record was read.)

10 Q. Mr. Boice, have you had any experience
11 with respect to the analysis that takes place in
12 deciding whether to undertake a removal action
13 under the 40 CFR Part 300 and the CERCLA
14 statute?

15 A. The type of documentation?

16 Q. Yes.

17 What is prepared, what kind of
18 questions are asked, what kind of questions are
19 answered.

20 A. Yes.

21 Q. All right.

22 Is there any inquiry made at the time
23 of a removal action as to whether or not
24 conditions at the site create or may create an

1 imminent endangerment to public health?

2 A. I believe so, yes.

3 Q. All right.

4 And if there is a determination that
5 conditions at the site may represent an imminent
6 endangerment to public health or the
7 environment, is removal action authorized?

8 MR. TENENBAUM: I am going to have to object
9 on the grounds that you are asking for a legal
10 conclusion from the witness.

11 Also, again I am not sure, I want to
12 make it clear that we are not designating this
13 witness to testify on removal action.

14 You are proceeding with your questions
15 based on whatever he knows under the Standard " "
16 deposition notice of him as an individual.

17 MR. KARAGANIS: I am proceeding under my
18 Schedule A.

19 Are you producing this witness, as you
20 have told me by telephone repeatedly, Mr.
21 Tenenbaum, as the designee under the Schedule A
22 of the American Can deposition notice?

23 MR. TENENBAUM: Depends on what the category
24 is, and I will have to look at our filing. I

1 don't have it here.

2 MR. KARAGANIS: With respect to questions
3 that relate to imminent substantial
4 endangerment?

5 MR. TENENBAUM: What number?

6 MR. KARAGANIS: Among others, item 2, item
7 4, item 5, item 6, item 7, item 8.

8 While you are looking, Mr. Tenenbaum,
9 at your objections, which are Exhibit A to the
10 Boice deposition, we have asked you to designate
11 witnesses having knowledge of certain areas that
12 relate to your charge that we have violated
13 Section 106 of the CERCLA/SARA statute, and
14 particularly that we have done so without
15 sufficient cause and for which you are seeking
16 the imposition of both penalties and damages up
17 to an including treble damages.

18 One of the questions that is central to
19 this is what are the factual bases for that,
20 what are the factual bases for the claim by the
21 United States that defendants have done so
22 without sufficient cause.

23 I have asked you to designate a witness
24 with respect to knowledge as to actions that

1 were taken and need to be taken to abate any
2 condition that may be or is creating an imminent
3 and substantial endangerment. I take it Mr.
4 Boice is your designee.

5 MR. TENENBAUM: Now I take it that you are
6 talking about request number 3 now. I am not up
7 to number 3 yet.

8 MR. KARAGANIS: I am not talking about
9 request number 3.

10 MR. TENENBAUM: That was all information
11 relating to whether American Can failed to
12 include --

13 MR. KARAGANIS: Also categories 2 --

14 MR. TENENBAUM: I know. I am not up to 3, I
15 said.

16 MR. KARAGANIS: I am sorry. 2 through 7
17 also relate to sufficient cause, because if
18 there is not an imminent substantial
19 endangerment, obviously --

20 MR. TENENBAUM: We can deal with sufficient
21 cause when we get there. 2. I thought 3 was
22 the first one. Do you want me to start with 2
23 did you say or 3?

24 MR. KARAGANIS: I am sorry, 3.

1 MR. KARAGANIS: I am sorry it is 2. It is
2 removal costs as well.

3 MR. TENENBAUM: As we indicated in our
4 response to number 1, the response costs
5 incurred at this site are so many, and what you
6 are asking is just too vague and non-specific
7 permit the designation of any witness in
8 response to number 2.

9 As I have indicated, if you want to ask
10 this witness what he knows about removal action
11 from reading the file, I will let you do that.
12 But, I want to make it clear that we are not.

13 MR. KARAGANIS: You are not designating him
14 for category number 2; is that right?

15 What about for category --

16 MR. TENENBAUM: If you have a specific
17 question, in order to save time and avoid the
18 need to have a new notice filed, if you have a
19 specific question about whether a particular
20 cost is consistent with the National Contingency
21 Plan, and depending on which cost that is, if
22 this is the witness that knows about that, then
23 you can do that.

24 But, just from what number 2 says, he

1 could not be the person, for instance, where we
2 would designate somebody on 1982 costs. He
3 might well not be the person who would testify
4 on that.

5 Furthermore, I am not sure that we are
6 seeking from American Can the particular costs
7 for 1982. I don't know that you are entitled
8 testimony about that.

9 MR. KARAGANIS: What about categories 3
10 through 7?

11 MR. TRENBAUM: As indicated in our
12 objections, we don't understand category number
13 3. Therefore, we haven't been able to designate
14 anybody in response to category number 3.

15 We do believe that it is vague and
16 ambiguous and misleading as to the requirements
17 of CERCLA, we don't understand what you are
18 getting at in number 3.

19 Furthermore, it appears that it is
20 going to record issues at least in part, so we
21 have objected on that ground as well.

22 If you have particular questions that
23 you would ask on number 3, if I could see how
24 that relates to a non-record issue, then I would

1 allow this witness, if is the one who has
2 knowledge upon that, he may well be. Then
3 rather than go through the formality of another
4 deposition notice, I would let him answer.

5 But, just in the general in the way it
6 is stated, I don't understand it. And if you
7 want to ask questions under it, that is fine.
8 If this witness would know the answer, then I
9 think I would designate him to answer that
10 question.

11 MR. KARAGANIS: Under category 2?

12 MR. TENENBAUM: If you have a question that
13 is not objectionable on the record-review ground
14 on that.

15 MR. KARAGANIS: All right.

16 MR. TENENBAUM: And if it avoids the other
17 objections we mentioned here.

18 MR. KARAGANIS: Categories 4 through 7.

19 MR. TENENBAUM: As we indicate in our
20 objections, the finding of an imminent
21 substantial endangerment is -- we have a pending
22 motion before the court.

23 It is our contention that that is a
24 record-review issue and the defendants have

1 disagreed with that. That's presently before
2 the court.

3 MR. KARAGANIS: The question is not whether
4 you can are going to allow him to testify. The
5 question is whether you are going to designate
6 the person having knowledge.

7 You had indicated to me before that you
8 were identifying Mr. Boice as the person having
9 knowledge of these subjects. Whether you
10 instruct him not to testify or not regarding a
11 given question is something that is premature at
12 this point.

13 MR. TENENBAUM: No.

14 I don't think I have ever indicated --
15 if we were going to indicate that Mr. Boice was
16 the person to testify on this, we would have
17 said that.

18 I think what I may have said perhaps is
19 that on some non-record issues Mr. Boice would
20 be designated.

21 MR. KARAGANIS: All of these categories
22 relate to, among other things, whether the
23 Defendant American Can Company had sufficient
24 cause, or, alternatively, another way of saying

1 it, is whether the government believes that
2 American Can was acting in bad faith in making
3 its response to the unilateral administrative
4 order issued under 196.

5 MR. TENENBAUM: We can discuss that when we
6 get to category number 3 --

7 MR. KARAGANIS: These categories relate to
8 that as well.

9 MR. TENENBAUM: -- issue.

10 MR. KARAGANIS: These categories relate to
11 that as well.

12 MR. TENENBAUM: We can discuss all of that
13 when we go 3, if we need to.

14 MR. KARAGANIS: Let's go to 5, 6 and 7.

15 MR. TENENBAUM: Again, this seeks
16 information on a record-review issue. And it is
17 vague and ambiguous. I don't know exactly what
18 questions you have.

19 If you want to ask him questions, it is
20 possible that -- I don't know without hearing
21 the questions, but upon hearing them.

22 MR. KARAGANIS: Is that on number 3 or is
23 that on 5, 6 and 7?

24 MR. TENENBAUM: 5 and 6, very similar

1 objections. 7 would have the same response as
2 3, which I think I indicated in that point. That
3 if you ask your questions, that it appears that
4 you are asking questions on a non-record issue,
5 and this would be the witness who is
6 knowledgeable about that.

7 Rather than waste time, I will let it
8 answer. 3 and 7 would go together.

9 5 and of 6 would go together on that
10 point.

11 Now we are up to number 8.

12 As we indicated in our objection to
13 number 8, we can't possibly designate somebody
14 or have anyone testify, even if it were
15 permissible for other reasons, on whether
16 American Can's alleged reasons for having
17 sufficient cause not to comply with EPA's order
18 are -- whether or not that constitutes
19 sufficient cause.

20 Because American Can has not yet told
21 us what those -- what it contends were the
22 sufficient causes for its not complying with
23 EPA's orders.

24 And I think American Can, along with

1 the other defendants, has agreed to provide us
2 supplementation of interrogatories, which may
3 provide further information on that.

4 In any event, after they were to have
5 done that, it would still likely -- depending
6 what the causes were, it would very likely still
7 be a record issue.

8 Whether or not there is sufficient
9 cause not to comply with the order would -- I
10 don't want to get into a detailed discussion of
11 what the case law requires on that, but they
12 already filed some briefs on that.

13 But, for many causes, at least the
14 first prong of that inquiry would involve
15 whether it would be objectively reasonable for
16 someone to conclude on the basis of the record
17 itself that the court would find EPA's orders to
18 be arbitrary and capricious.

19 MR. KARAGANIS: Or otherwise not in
20 accordance with the law, Mr. Tenenbaum.

21 If you read Section 113, it adds the
22 phrase or otherwise not in accordance with the
23 law. It is not simply limited to arbitrary and
24 capricious.

1 MR. TENENBAUM: Well, I don't know what your
2 sufficient cause is, when you say it is not
3 according to the law. We are talking in the
4 abstract here.

5 MR. KARAGANIS: I am talking about
6 specifically the statute known as CERCLA/SARA
7 and 40 CFR Part 300.

8 Is that specific enough for you?

9 MR. TENENBAUM: That is a big statute and
10 this is a big case.

11 I am not sure what causes you have in
12 mind. It may well be that that would be
13 determined on the record, too, I just can't tell
14 in the abstract. I don't know what you are
15 contending.

16 MR. KARAGANIS: Mr. Tenenbaum, you have
17 allowed this witness for several days to testify
18 about what he considered to be the bad faith of
19 the representatives of the defendants. Bad
20 faith relates specifically to the absence of
21 sufficient cause under the statute.

22 MR. TENENBAUM: Subject to my objections, I
23 have allowed the witness to testify on the
24 impression of bad faith, for the most part in

1 connection with only when a proper foundation
2 has been established, and then in connection
3 the most part with the issue of whether or not
4 the amount of any penalties assessed in this
5 case could somehow be related to whether or not
6 the defendants proceeded in good faith or bad
7 faith in performing the DT/PS.

8 MR. KARAGANIS: Well, is it true, Mr.
9 Tenenbaum, that the government is seeking
10 penalties from my client, American Can Company?

11 MR. TENENBAUM: The United States is seeking
12 penalties from American Can Company.

13 And if you want to ask questions, we
14 objected to that line of questioning as well.
15 But, if you want to ask questions as to whether
16 or not the United States believes that American
17 Can Company or its agents have acted in bad
18 faith, the witness will -- if the witness has a
19 impression of bad faith in that connection, the
20 witness can answer that.

21 MR. KARAGANIS: I am also entitled to ask
22 this witness with regard to --

23 MR. TENENBAUM: With regard to sufficient
24 cause, there is one point which subject to my

1 objections we allowed questioning with respect
2 to whether or not a change in position by
3 defendant or its agents, its contractors, might
4 somehow conceivably turn out to be relevant at
5 trial.

6 And we would allow that question. But,
7 it was subject to TV objections limited to the
8 change in position type issue.

9 MR. KARAGANIS: Rather than fill up this
10 transcript with narrative by the attorneys, I am
11 going to begin asking questions.

12 If you want to instruct the witness not
13 to answer, that is your prerogative subject to
14 whatever sanctions the court may impose.

15 Q. Mr. Boice, with respect to the removal
16 that takes place under the National Contingency
17 Plan, specifically with respect to the removal
18 that took place at the Midco I site, is there a
19 determination made when to stop the removal
20 action?

21 A. Yes.

22 Q. All right. And what is the basis of
23 that determination under the statute, the
24 regulation?

1 MR. TENENBAUM: Objection, calls for a legal
2 conclusion. And, I don't know, no foundation
3 established as to whether or not this witness
4 was there when that happened.

5 BY MR. KARAGANIS:

6 Q. Go ahead.

7 A. Okay.

8 Well, Alan stated I wasn't at the Midco
9 removal. As I previously stated in my
10 testimony, I have experience doing one, being an
11 OSC at one removal action.

12 Basically, it establishes a scope of
13 work to -- for example, at Midco I to remove the
14 drums and the highly contaminated soils. And
15 when they are finished with that, then that
16 finishes that removal action.

17 BY MR. KARAGANIS:

18 Q. Is that removal action intended to
19 abate or protect against a public health
20 endangerment?

21 A. Yes.

22 And it is usually not just an imminent
23 and substantial, the standard is higher, it has
24 to be an immediate threat.

1 Q. And when that immediate threat or that
2 endangerment is taken care of, is that when the
3 removal action ends?

4 A. Well, based on the situation, they
5 develop a plan to address the immediate threat,
6 and when that is finished, then the action is
7 finish. That is my understanding.

8 Q. So when the immediate threat has been
9 addressed, the action is finished; is that
10 correct?

11 A. Yes.

12 Q. When public health protection has been
13 provided, is that correct?

14 MR. TENENBAUM: Same continuing objection.

15 A. Yes.

16 Public health protection from the
17 immediate threat.

18 BY MR. KARAGANIS:

19 Q. All right.

20 And I take it there was a determination
21 made at Midco 1 to end the removal action after
22 certain elements had been taken care of; is that
23 correct?

24 A. Yes.

1 Q. And I take it, based on what you have
2 said, that that is then a determination that is
3 immediate public health threat that was going to
4 be addressed by that removal action had been
5 addressed; is that right?

6 A. Yes. At least in the Agency's opinion
7 at that time.

8 Q. Right.

9 And that was done in 1982, you say?

10 A. Yes.

11 Q. Was there a similar action taken at
12 Hidco II?

13 A. Yes.

14 Q. When was that taken, when did that take
15 place?

16 A. It started in 19 -- it started in 1984
17 and then it was continued in 1985, and I think
18 it was -- most of it was completed in '86.

19 There were some wastes still on the
20 site in '89.

21 Q. Is there a document indicating why the
22 removal was completed or terminated at Hidco II?

23 A. Yes.

24 Q. All right.

1 Does that document have a name?

2 A. Well, it hasn't been prepared yet. It
3 is called and on scene coordinator's report.

4 MR. TENENBAUM: Again, I want to reiterate
5 that this witness is not the Agency's designee
6 on removal actions.

7 BY MR. KARAGANIS:

8 Q. Who is the on scene coordinator?

9 MR. TENENBAUM: Therefore, I am going to
10 object to this line of questioning. And I am
11 going to allow it to proceed only under the
12 personal deposition notice that Standard T
13 filed.

14 A. Okay.

15 BY MR. KARAGANIS:

16 Q. I am asking who the on scene
17 coordinator is?

18 MR. BERMAN: Can you specify when, and
19 where?

20 MR. KARAGANIS: Let's deal with Midco II in
21 1984 and '85.

22 A. It's, William Simes. S-i-m-e-s.

23 Q. And who is the current on scene
24 coordinator for Midco II?

1 A. I think there is no further action at
2 the site. So there is no on scene coordinator
3 at this time.

4 Q. Who is to prepare the on scene
5 coordinator's report?

6 A. The contractor is working on that now.

7 Q. Who is that contractor?

8 A. It is our technical assistance team
9 contract with Roy F. Weston.

10 Q. Who at Roy F. Weston is working on the
11 on scene coordinator's report?

12 A. I don't know.

13 Q. Why was the on scene coordinator's
14 report not filed for the Midco II site?

15 A. Because the action wasn't completed
16 until sometime I think in 1989.

17 Q. How was the action completed in 1989?

18 A. They continued removal of wastes from
19 the site, and then there was a small amount
20 left. And since we were solidifying the surface
21 soils, we decided that it could just be
22 solidified along with the surface soils.

23 Q. Why was it determined that you could
24 wait to solidify the surface soils as opposed to

1 completing the removal action?

2 A. Well, I don't understand your question.

3 Q. I take it you left some contaminants on
4 the surface and didn't remove them pursuant to
5 the removal action at Midco II?

6 A. Right.

7 Some soils had been excavated or
8 removed from the filter bed and the sludge pit.

9 Q. And under the original removal action,
10 they were to be removed from the site; is that
11 correct?

12 A. I think that was the original plan,
13 yes.

14 Q. All right.

15 And from what you have just said, I
16 take it that EPA determined that these soils
17 could await the solidification rather than be
18 removed from the site; is that right?

19 A. Yes.

20 Q. I take it, then, that there had to be a
21 determination made that the presence of these
22 soils on the site did not present an immediate
23 threat justifying removal action; is that
24 correct?

1 A. I wasn't involved in that, but I
2 imagine so.

3 Q. Were you asked whether or not you would
4 approve incorporating these residual soils into
5 the remedial action?

6 A. Yes.

7 Q. Did you ask the persons responsible for
8 the termination of the removal action whether or
9 not they had determined that the immediate
10 threat was taken care of under existing
11 conditions?

12 A. Did I ask them?

13 Q. Yes.

14 A. No.

15 I didn't specifically ask them. That
16 is their determination.

17 Q. But, under EPA regulations, there
18 should be some record determination that no
19 further removal action is needed; isn't that
20 right?

21 MR. TENENBAUM: Objection.

22 That question calls for a legal
23 conclusion.

24

1 BY MR. KARAGANIS:

2 Q. Go ahead.

3 A. That is what I said.

4 But, your question was whether I asked
5 them, that that had been done.

6 Q. Who made the determination that no
7 further removal action was necessary despite the
8 fact that contaminated soils were left on the
9 site?

10 A. Our emergency response branch would
11 have made that.

12 Q. Who would that have been?

13 A. I'm not sure, maybe Len Zintak.

14 Q. How do you spell that?

15 A. L-e-n, Z-i-n-t-a-k, I think.

16 Q. All right.

17 A. Or maybe Bill Simes, Jack Barnett.

18 Q. Would they have reflected that decision
19 with a memo to you?

20 A. They would have reflected the decision
21 some place, but I'm not sure how.

22 Q. The decision that these soils can
23 remain on the site without presenting an
24 immediate threat to public health, is that

1 memorandum or document included in the record in
2 this case?

3 A. No.

4 It would be in the on scene
5 coordinator's report.

6 Q. And that is not in the record in this
7 case; is that correct?

8 A. No, because it hasn't been completed.

9 Q. There is some document that already
10 stands that says we are not going to move
11 forward with the removal of these coils; isn't
12 that right?

13 A. There would be some document
14 documenting our decision on that.

15 Q. All right.

16 Which is already in existence; isn't
17 that right?

18 A. Yes.

19 Q. And that's not in the record in this
20 case, isn't that right?

21 A. That's correct.

22 Q. And that document would have involved
23 determination as to the nature and extent of any
24 existing public health threat, isn't that right?

1 A. It would have addressed that somehow.

2 Q. Yes.

3 Q. Thank you.

4 Now, let's go back to Video 1. Is
5 there an on scene coordinator's report for Video
6 1?

7 A. No. There was no requirement to
8 prepare an on scene coordinator's report at that
9 time.

10 Q. All right.

11 Where does one on scene coordinator's
12 report requirement come from?

13 MR. TENENBAUM: Objection. Calls for a
14 legal conclusion.

15 MR. KARAGANIS: I am asking about this
16 gentleman's practice and the Agency's practice,
17 Mr. Tenenbaum.

18 MR. TENENBAUM: Same objection.

19 A. Well, right now it is in the National
20 Contingency Plan. Previously it was probably in
21 some Agency guidance document.

22 BY MR. KARAGANIS:

23 Q. When you say right now, what National
24 Contingency Plan are you referring to?

1 MR. TENENBAUM: Same continuing objection.
2 Q. The currently effective, revised
3 Contingency Plan.
4 BY MR. KARAGANIS:
5 Q. Is that the 1990 plan?
6 A. It is in there, I know.
7 It is probably in some of the previous
8 ones also.
9 Q. All right.
10 Apart from an on scene coordinator's
11 report, is it not correct that the report states
12 that no further removal action would be
13 necessary at Midco I would be reflected in some
14 sort of documentation; in other words, a
15 decision that the removal action that was
16 undertaken was satisfactory to address the
17 immediate public health threat?
18 A. I think I already said that there must
19 be some type of documentation of that.
20 Q. I am now talking about Midco I now.
21 A. Midco I. Oh.
22 BY MR. TENENBAUM: Same objection, no
23 foundation.
24 A. I don't think so.

1 I think there is just a document
2 indicating that -- documentation indicating that
3 completed the action.

4 I don't remember any document saying
5 they have -- that it eliminated the threats or
6 something.

7 BY MR. PARAGANIS:

8 Q. The action is shaped and structured so
9 as to address the threat, is it not?

10 There is a document that is prepared
11 that says here is the threat that we face and
12 here is the work that's needed to address the
13 threat; isn't that right?

14 A. Yes.

15 Q. All right.

16 Are those documents with respect to
17 Midco I and the removal action in the record
18 that has been identified here by EPA?

19 A. Yes.

20 Q. All right.

21 Where are those?

22 A. In the administrative record.

23 Do you want me to get the document?

24 Q. Yes. I would like them identified,

1 please. .

2 A. Okay.

3 There is a March 30, 1982 memo from
4 William Hedeman to Christopher Capper.

5 Q. Just a moment, please.

6 March 30, 1982?

7 A. Yes.

8 A. And it is signed by Christopher Capper
9 on April 1, 1982.

10 From Hedeman to whom?

11 A. Christopher Capper.

12 And there's also and April 1, 1982
13 memorandum from Christopher Capper to the
14 administrator signed by John E. Daniel on April
15 15, 1982.

16 Q. Now, would you just kindly check the
17 administrative record index that these documents
18 are located in, to see if both of these are
19 shown in the index.

20 I will get you the index, hold on just
21 a second.

22 Exhibit 1. Mr. Board. Exhibit 2. Exhibit 3
23 Exhibit No. 3 is the certification of record
24 index.

1 And you have identified two documents,
2 . memorandum from Hedeman to Christopher Capper,
3 which is March 30, 1982, then a memorandum from
4 Capper to the administrator of April 1, 1982.

5 Could you show me where in the index
6 those are located?

7 A. Right here.

8 Continued removal activities, author
9 Capper USEPA, date 82-4-1.

10 The memo from Hedeman to Capper is an
11 attachment to the 4-1-82 memo from Capper to the
12 administrator.

13 Q. So the only document that is listed in
14 the index is the April 1, 1982 Capper memo,
15 which when you look at the document has the
16 attachment including the March 30 memo; is that
17 right?

18 A. Yes.

19 The March 30 memo is probably an
20 attachment to the April 1 memo.

21 Q. All right.

22 Now I see it, please.

23 A. I should clarify that.

24 It is not as cut-and-dried as you

1 indicated before, that we complete an action,
2 when we address all the -- whatever immediate
3 hazard has been identified.

4 Sometimes it also depends on a time
5 limit. There is a six-month time limit on
6 completing remedial actions. If they don't
7 complete that, then we need an extension.

8 And also there is budgetary limits. A
9 certain amount of money is set aside. Once that
10 is used up, we need to get approval to obligate
11 more money for that removal action.

12 Q. Okay.

13 A. So it is not automatically that will be
14 approved.

15 Q. You have to get extensions, right?

16 A. Extensions and approval for additional
17 money.

18 Q. You got those approvals and extensions,
19 did you not, with respect to Midco I?

20 A. I wasn't with the Agency.

21 I mean, I wasn't with the program at
22 that time.

23 Q. Well, did the Agency get the approval
24 to complete the removal action it wanted to do

1 at Midco I?

2 MR. TENENBAUM: Same objection.

3 You are only testifying about what you
4 know personally.

5 A. As far as I know it did.

6 BY MR. KARAGANIS:

7 Q. You mentioned there is the April 1,
8 1982 memorandum from Capper to the
9 administrator?

10 A. Yes.

11 Q. Is there then an approval document by
12 the administrator?

13 A. He signed it. At least I presume that
14 that is the acting administrator.

15 Q. So the concurrence is by Acting
16 Administrator Daniel; is that right?

17 A. That is my understanding.

18 Q. Okay.

19 Now, the March 30, 1982 memorandum from
20 Capper to Hedeman -- I am sorry, from Hedeman to
21 Capper.

22 Hedeman was a Washington official, was
23 he not?

24 A. Yes.

1 Q. All right.

2 Are there any other documents in the
3 record reflecting what must have been sent to
4 Hedeman in order to justify the removal work?

5 A. Okay.

6 Well, there is this attachment, which
7 probably came from the region.

8 Q. Now the attachment --

9 MR. TENENBAUM: Please limit your testimony
10 to what you know.

11 Don't speculate about what happened
12 unless you know it happened.

13 BY MR. KARAGANIS:

14 Q. Can you tell me how far the attachment
15 goes, so I am clear as to how far the document
16 that is located in the index goes?

17 A. It goes to the next red star.

18 Q. So the next red star in the record is
19 an indication of a new document?

20 A. Yes.

21 Q. Now, would it not be correct that there
22 would be in the files of the region additional
23 documentation as to the scoping, the nature of
24 the contamination that existed at the site and

1 the scoping of the removal action that was
2 necessary to address any imminent health threat?

3 MR. TENENBAUM: Same continuing objection.

4 A. Yes. There is also additional
5 information in the record.

6 BY MR. KARAGANIS:

7 Q. Now, what additional information is
8 that?

9 A. There is an emergency action plan.

10 Q. Where is that?

11 A. That is the second document in the
12 original administrative record index.

13 Q. When you say emergency action plan,
14 whose plan is that, and who is the author?

15 A. It is probably prepared by our
16 technical assistance team.

17 Q. And what is the date on it, please?

18 A. There is no date on it.

19 Q. May I see it, please?

20 This is the document which is entitled,
21 "Emergency action plan, Midco I, Gary, Indiana"?

22 A. Yes.

23 Q. How far does that document go, to the
24 next red star?

1 A. Yes, uh-hum.

2 Q. And when you say it was prepared by
3 EPA, who prepared it?

4 MR. TENENBAUM: Wait.

5 Only what you know.

6 A. Okay.

7 I'm not sure.

8 BY MR. KARAGANIS:

9 Q. Who do you think prepared it?

10 A. Probably our contractor.

11 Q. Who do you think your contractor was?

12 A. Ecology & Environment.

13 Q. All right.

14 A. I am not finished with the answer,
15 though.

16 There's probably other ones in here.

17 Q. All right.

18 The second document in the record in
19 the original index, that was called again what,
20 Mr. Boice?

21 A. Emergency action plan.

22 Q. Okay.

23 A. I haven't had time to review these
24 thoroughly, but I presume that this is one

1 document.

2 Q. Why don't we do this at this point.

3 Would you spend the time to identify
4 the remainder of the afternoon the documents
5 that relate to the investigation leading up to
6 the removal decision, so that we can begin first
7 thing in the morning on those documents?

8 A. I have a list right in our response to
9 the defendants' first, generator defendants'
10 first interrogatories from 1985.

11 If you want to get that, I can look it
12 up there.

13 Q. That is a list of all of the --

14 A. Everything I could find.

15 Q. With respect to the removal action?

16 A. Yes.

17 Q. All right.

18 Would you bring that with you tomorrow
19 morning?

20 A. We have it here.

21 MR. TENENBAUM: I don't know whether we have
22 it. That is a formal paper in the case.

23 I don't know whether EPA is going to be
24 able to get that out or not.

1 Let's go off the record for a second.

2 (Discussion had off the record.)

3 Back on the record.

4 We will look in our files and if we can
5 find it, we will certainly bring it.

6 MR. KARAGANIS: We are in recess until
7 tomorrow morning. What time do you want to
8 start?

9 MR. TENENBAUM: 9:00.

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(Whereupon the deposition was

continued to August 2, 1990, at

9:00 o'clock a.m.)

2931834 E.S. 8/1/90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIDWEST SOLVENT RECOVERY, INC.;
MIDWEST INDUSTRIAL WASTE
DISPOSAL COMPANY, INC.;
INDUSTRIAL TECTONICS, INC.; V&E
CORPORATION; ERNEST DEHART;
EDWARD D. CONLEY; LOVIE DEHART;
CHARLES A. LICHT; EUGENE KLISLAK;
JEANETTE KLISLAK; ROBERT J.
DAWSON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPO-
RATION; INSILCO CORPORATION;
RUST-OLEUM, INC.; ZENITH
ELECTRONICS CORPORATION,
formerly known as ZENITH RADIO
CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN
CAN COMPANY; PRE FINISH METALS,
INC.; PREMIER COATINGS, INC.;
MOTOROLA, INC.; and DESOTO, INC.,

Defendants.

Civil Action No.
H-79-556
Judge Moody

DEPOSITION
EXHIBIT

Boice 52
8-1-90 ag

NOTICE OF DEPOSITION PURSUANT TO RULE 30(b)(6)
OF THE FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Defendant/Third-Party Plaintiff **AMERICAN CAN COMPANY** requests Plaintiff **UNITED STATES OF AMERICA**, to designate and produce for deposition (or depositions) the person or persons having knowledge of the matters set forth in the categories described in Schedule A attached hereto. In addition, deponent (or deponents) is requested to produce at the time and place of deposition all documents relating to the subject matter set forth in the categories listed in Schedule A.

For purposes of this request, the term "documents" shall include, but not be limited to, all correspondence, memoranda, minutes, stenographic or

90-17-1-1

AUG 22 1990

LANDS DIVISION
CIVIL RECORDS

handwritten notes, bills of lading, receipts, manifests, lift tickets, disposal tickets, canceled checks, studies, surveys, books, pamphlets, pictures, voice recordings, statistical data, computer programs, computer data (tapes or otherwise), reports, drafts, engineering drawings, diagrams, data sheets, calculation work sheets, photographic slides or motion pictures.


For purposes of this request, the term "Midco sites" refers to the sites and properties which are the subject of the United States' Second Amended Complaint in the above captioned litigation.

For purposes of this request, the "American Can Company" means American Can Company, National Can Company and American National Can Company.

Plaintiff United States of America is requested to produce the person or persons designated by them pursuant to this Notice and the documents to be produced in accordance with this Notice at the offices of McDermott, Will & Emery, 227 West Monroe Street, Suite 2000, Chicago, Illinois 60606 on **FRIDAY, MAY 18, 1990 AT 9:00 A.M.** such deposition or (depositions) to be continued on **May 21, 22, 24, 25, 31 and June 1, 1990** and shall be continued from time to time thereafter until completed.

Respectfully submitted,

Defendant/Third-Party Plaintiff
AMERICAN CAN COMPANY

By: 
Joseph V. Karaganis
A. Bruce White
Ellen Lois Zisook
KARAGANIS & WHITE LTD.
414 North Orleans
Chicago, Illinois 60610
(312) 836-1177

AMCAN040

SCHEDULE A
TO NOTICE OF DEPOSITION PURSUANT TO RULE 30(b)(6)
OF THE FEDERAL RULES OF CIVIL PROCEDURE

Categories For Which Information And Documents
Are To Be Produced Pursuant To This Notice

1. All facts or information relating to whether American Can Company arranged for the treatment or disposal of hazardous substances at either or both of "Midco" sites which are the subject of the above captioned litigation. (See *inter alia* paragraph 21 of the Second Amended Complaint.)

2. All facts or information relating to whether the removal or remedial costs incurred or to be incurred by the United States at the Midco Sites are consistent or inconsistent with the national contingency plan referred to in 42 U.S.C. Section 9607(a).

3. All facts or information relating to whether the hazardous substances allegedly sent by American Can Company to the "Midco" sites necessitated the removal and or response costs sought by the United States in the Second Amended Complaint in the above captioned cause.

4. All facts or information relating to whether there is or may be an imminent and substantial endangerment to the public health, welfare or environment at either of the Midco sites and the date at which such imminent and substantial endangerment arose.

5. All facts or information relating to the specific relief actions necessary to abate such danger or threat within the meaning of 42 U.S.C. Section 9606(a) at either or both of the Midco sites.

6. All facts or information relating to whether the relief demanded by the United States as to either or both of the Midco sites meets any of the other requirements of 42 U.S.C. Section 9606(a).

7. All facts or information relating to whether the hazardous substances allegedly sent to the Midco sites by American Can Company were a causal factor in requiring "relief as may be necessary to abate such danger or

threat." or in requiring relief under any other portion of 42 U.S.C. Section 9606(a) at the Midco sites.

8. All facts or information as to whether American Can Company failed or refused to comply with the United States Section 106 orders relating to the Midco sites without sufficient cause.

9. All facts or information relating to across-the-board use by the United States EPA of administrative 106 orders at all sites on the National Priorities List, regardless of whether there exists an imminent and substantial endangerment; and the practice of declaring an imminent and substantial endangerment at all such sites regardless of whether there actually exists an imminent and substantial endangerment.

10. All facts or information relating to standards or criteria used by the United States EPA in distinguishing between National Priorities List (NPL) Sites where no imminent and substantial endangerment may exist and those NPL sites where an imminent and substantial endangerment may exist.

SERVICE LIST

Robert J. Addison
Addison, Stone, Stiles &
Katich
1000 East 80th Place
Merrillville, Indiana 46410

Edward R. Andrus, Jr.
Premier Coatings, Inc.
2250 Arthur Avenue
Elk Grove, Illinois 60007

Percy L. Angelo
James W. Gladden, Jr.
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603

Terence M. Austgen
Singleton, Levy, Crist &
Johnson
9245 Calumet Ave. #200
Munster, Indiana 46321

VIA FEDERAL EXPRESS
Andrew B. Baker, Jr.
Assistant United States
Attorney
507 State Street
Hammond, Indiana 46320

David Barr
21322 Kildare
Matteson, Illinois 60601

Robert Bauer
Hubbard, O'Brien & Hall
221 North LaSalle Street
Chicago, Illinois 60601

Anne M. Beckert
Ross & Hardies
150 N. Michigan
Chicago, Illinois 60601

Lewis D. Beckwith
George Plaws
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204

Norman B. Berger
Holleb & Coff
55 East Monroe Street
Suite 4100
Chicago, Illinois 60603

VIA MESSENGER
Michael R. Berman
Assistant Regional Counsel
U.S.EPA - Region V
230 South Dearborn
Chicago, Illinois 60604

Roy Bernstein
Gottlieb and Schwartz
Suite 6900
200 East Randolph Drive
Chicago, Illinois 60601

John Borst
Zenith Radio Corporation
1000 Milwaukee Avenue
Glenview, Illinois 60225

Michael Boylan
P.O. Box 705
Geneva, Illinois 60134

Brian Burchett
3609 Main Street
East Chicago, Indiana 46312

Richard C. Browne
Bishop, Cook, Purcell &
Reynolds
1400 L Street, N.W.
Washington, D.C. 20005

Robert Casey
315 James Street
Geneva, Illinois 60134

Melvin Corn
301 West 4th Street
Marion, Indiana 46592-0013

Joseph E. Costanza
David K. Ranich
Murphy, McAtee, Murphy &
Costanza
720 West Chicago Avenue
East Chicago, Indiana 46312

John E. Cromer
Cromer, Eaglesfield & Maher
Station Place 535
200 South Meridian Street
Indianapolis, Indiana 46225

Raymond R. Cusack
Johnson, Cusack & Bell
222 North LaSalle Street
Suite 2200
Chicago, Illinois 60601

Thomas Dent
Michael F. Dolan
Seyfarth, Shaw, Fairweather
& Geraldson
55 East Monroe Street
Chicago, Illinois 60603

Richard DeSanti
Allen J. Topol
Covington & Burling
1201 Pennsylvania Ave, N.W.
Washington, D.C. 20044

John C. Duffey
Anthony S. Benton
Stuart & Branigin
8th Floor, The Life Building
Lafayette, Indiana 46902

Ronald C. Ecksten
Continental Can Company
P.O. Box 5410
Norwalk, CT 06856-5410

Charles Enslen
5231 Hohman Avenue
6th Floor
Hammond, Indiana 46320

Lowell Enslen
Gary Matthews
Enslen, Enslen & Matthews
142 Rimbach Street
Hammond, Indiana 46320

Larry Evans
Hoeppner, Wagner & Evans
Northern Indiana Bank Bldg.
Valparaiso, Indiana 46383

James G. Fausone
David L. Tripp
Dykema, Gossett, Spencer,
Goodnow & Trigg
400 Renaissance Center
35th Floor
Detroit, Michigan 48243

Thomas F. Downing
DuPage County State's
Attorney's Office
207 South Reber Street
Wheaton, Illinois 60187

James J. Flynn
Quinn, Jacobs, Barry & Miller
135 South LaSalle Street
Suite 125
Chicago, Illinois 60603

Jeffrey C. Fort
Gardner, Carton & Douglas
321 North Clark Street
Suite 3400
Chicago, Illinois 60610-4795

E. Kenneth Friker
180 North LaSalle Street
Chicago, Illinois 60601

Ronald B. Given
Mayor, Brown & Platt
190 S. LaSalle
Chicago, Illinois 60603

Daniel J. Leahy
Leahy & Eisenberg, Ltd.
309 West Washington
Suite 800
Chicago, Illinois 60606

David B. Graham
Freedman, Levy & Kroll
1050 Connecticut Ave., N.W.
Suite 825
Washington, D.C. 20036-5339

Joel Gross
Alan Tenenbaum
Department of Justice
Environmental Enforcement
Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Albert L. Hand
Hand, Muenich & Wilk
3235 45th Avenue
Highland, Indiana 46322

Timothy Harker
2021 K Street, N.W.
Washington, D.C. 20006

Harold A. Harris
29 South LaSalle Street
Chicago, Illinois 60603

Mark Hellner
Rosenberg, Opdycke, Gildea,
Helener & Kelly
10 North Dearborn Street
6th Floor
Chicago, Illinois 60602

Robert Hess
Sachs & Hess
5832 Hohman Avenue
Hammond, Indiana 46320

Martha Hollingsworth
Bingham, Summers, Welsh &
Spilman
2700 Market Tower
10 West Market Street
Indianapolis, Indiana 46204

Richard S. Jalovec
955 West Madison Street
Chicago, Illinois 60607

Jerry E. Juelat
R. Kent Rowe
R. Kent Rowe Law Office
900 St. Joseph Bank Building
South Bend, Indiana 46601

James T.J. Keating, P.C.
542 South Dearborn Street
Suite 1200
Chicago, Illinois 60605

Melanie Kelley
American National Can
Company
8770 West Bryn Mawr Ave.
Mail Suite #140
Chicago, Illinois 60631

VIA FEDERAL EXPRESS
Helen Keplinger
Attorney-Advisor
Office of Enforcement
U.S.EPA
401 M. Street, S.W.
Washington, D.C. 20402

Scott L. King
504 Broadway
Suite 1016
Gary, Indiana 46402

Richard J. Kissell
M. Therese Yasdick
Martin, Craig, Chester &
Sonnenschein
115 South LaSalle Street,
Suite 2400
Chicago, Illinois 60603

Peter G. Koransky
Spangler, Jennings &
Spangler
8396 Mississippi Street
Merrillville, Indiana 46410

Susan Kuis
PPG Industries
One PPG Plaza
Pittsburgh, PA 15272

Martin W. Kus
Mark Lienhoop
Newby, Lewis, Kaminski &
Jones
916 Lincolnway
LaPorte, Indiana 46350

Eric Landau
Katten, Mutchin & Zavis
525 West-Monroe, Suite 1600
Chicago, Illinois 60606-3693

Dixie Laswell
Andrew Perellis
Coffield, Ungaretti, Harris &
Slavin
Three First National Plaza,
Suite 3500
Chicago, Illinois 60602

Richard J. Lesniak
Lawson & Lesniak
3926 Main Street
East Chicago, Indiana 46312

Richard J. Lewandowski
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.
2 East Mifflin Street, Suite 600
P.O. Box 2509
Madison, WI 53701-2509

Judy Lipson
Montgomery Ward-Legal
Division
One Montgomery Ward Plz.
Chicago, Illinois 60671

Ralph W.F. Lustgarten
John R. Adams
Taylor, Miller, Sprowl,
Hoffmagle & Merletti
33 North LaSalle Street
Suite 1900
Chicago, Illinois 60602-2602

Michael McCluggage
Wildman, Harrold, Allen &
Dixon
225 West Wacker Drive
Chicago, Illinois 60606-1229

Marili McFawn
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606

G. Edward McHie
McHie, Myers & McHie
53 Muenich Court
Hammond, Indiana 46320

Daniel Medrea
Carolyn Hesse
Lucas, Holcomb & Medrea
1000 East 80th Place
Suite 606
Merrillville, Indiana 46410

Vance Miellicki
DeSoto, Inc.
1700 S. Mt. Prospect Road
Des Plaines, Illinois 60018

Milford M. Miller
Livinston, Dildine, Haynie &
Yoder
1400 One Summit Square
Fort Wayne, Indiana 46802

William J. Moran
900 Indianapolis Boulevard
Highland, Indiana 46322

Melvin Morris
2216 Broadway
East Chicago, Indiana 46312

Michael Murphy
Rust-Oleum Corporation
11 Hawthorne Parkway
Vernon Hills, Illinois 60061

David M. Myers
P.O. Box 230
Celine, Ohio 45822

William O'Connor
O'Connor & O'Connor
5272 Hohman Avenue
Hammond, Indiana 46320

Robert Olian
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Leo A. Ostrowski
7 North Court Street
Crown Point, Indiana 46307

David R. Pawlowski
Stults, Custer, Kutansky et al.
3637 Grant Street, Box 15050
Gary, Indiana 46404-5050

Leonard M. Polisan
Stuart I. Gold
Herzfield & Rubin
40 Wall Street
New York, New York 10005

Steven R. Radtke
Chill, Chill & Radtke
100 West Monroe Street
Suite 905
Chicago, Illinois 60603

Raymond T. Reott
Jenner & Block
One IBM Plaza, 44th Floor
Chicago, Illinois 60611

Louis M. Rundio, Jr.
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606

Jeffrey D. Salbert
521 East 86th Avenue
Suite G
Merrillville, Indiana 46410

Ron Sanberg
Senior Counsel
Environmental Cooper
Industries, Inc.
First City Tower, Suite 4000
P.O. Box 4446
Houston, Texas 77210

Michael Schaefer
Deputy Attorney General
219 State House
Indianapolis, IN 46204-2794

Donald L. Schriber
401 West State Street
Suite 701
Rockford, Illinois 61101

Harvey Sheldon
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603

Michael Silverman
Kwiat & Silverman, Ltd.
537 North Wells Street
Chicago, Illinois 60610

J.B. Smith
Beckman, Kelly & Smith
5900 Hohman Avenue
Hammond, Indiana 46320

James Sneider
William Hutul
Sneider & Troy
180 North LaSalle Street
Suite 2323
Chicago, Illinois 60601

Joseph Stalmack
Galvin, Stalmack, Kirschner
& Clark
5253 Hohman Avenue
Hammond, Indiana 46320

Fred Stults, Jr.
Stults, Custer, Kutansky &
McClean
3637 Grant Street
Gary, Indiana 46408

Steven Tasher
Willkie, Farr & Gallagher
1155 21st Street, N.W.
Washington, D.C. 20036-3302

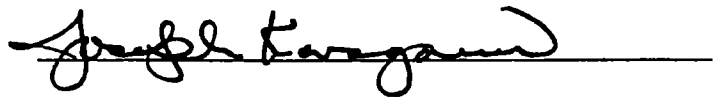
VIA FEDERAL EXPRESS
Alan S. Tenenbaum
Environmental Enforcement
Section
Environment and Natural
Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin
Station
Washington, D.C. 20044

Thomas T. Terp
Taft, Stettinius & Hollister
1800 First National Bank Plz.
Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing same in an envelope via United States mail, first class and postage prepaid, except where specifically noted, May 8, 1990, as follows:

SEE ATTACHED SERVICE LIST

A handwritten signature in cursive script, reading "Joseph V. Karaganis", is written over a horizontal line.

Joseph V. Karaganis
A. Bruce White
Ellen Lois Zisook
Karaganis & White Ltd.
414 North Orleans
Suite 810
Chicago, Illinois 60610
(312) 836-1177

W. Gerald Thursby
Gerladd T. Karr
Rooks, Pitts, Fullagar and
Poust
55 West Monroe Street
Suite 1500
Chicago, Illinois 60603

Ann C. Tighe
Cosirilos & Crowley, Ltd.
33 North Dearborn Street
Chicago, Illinois 60602

Stephan K. Todd
USX Corporation
600 Grant Street
Pittsburgh, PA 15230

John Ubinger, Jr.
Eckert, Seamans, Cherin &
Mellott
42nd Floor, 600 Grant Street
Pittsburgh, PA 15219

Joseph Van Bokkelen
Goldsmith, Goodman, Ball &
Van Bokkelen
3737 45th Street
Highland, Indiana 46322

Grant Van Horne
Van Horne & Turner
P.O. Box 523
Auburn, Indiana 46706

Bruce L. Wald
Tishler & Wald
55 West Monroe Street
Suite 700
Chicago, Illinois 60603

George C. Wallace
1301 East Algonquin Road
Schaumburg, Illinois 60196

Allen W. Williams, Jr.
Mark Thimke
Foley & Lardner
777 East Wisconsin Avenue
Milwaukee, Wisconsin 43202